

APPENDIX IV

TAB F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Casey J. Kitchell, et al.

vs. 04 CV 02688

Deer Area School
District, et al.

REPORT: Honorable John A. Jones III

PLACE: Williamsport, Pennsylvania

PROCEEDINGS: Oral Argument

DATE: Thursday, July 14, 2005

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1 THE COURT: All right.

2 THE COURT: We have several matters before the
3 court this afternoon, the first of which I raised by
4 agreement at the application to adjourn by the Foundation
5 for Thought and Ethics, followed by a motion to quash which
6 will come second.

7 Is that everybody's agreement? Is that acceptable
8 to everybody or are we lined up differently?

9 MR. BERN: I think that was the initial intent.
10 You know, somewhere down the pike we were advised that
11 the newspapers would be going first and the intervenors
12 would be going second. It doesn't matter to me.

13 THE COURT: It doesn't matter to me. Are we lined
14 up to go with the newspapers first? All right, that's
15 perfectly fine with me.

16 MR. BERN: I think it will be a brief argument.

17 THE COURT: All right, we can certainly do that.

18 Why don't we have counsel make your appearances,
19 please, clearly in the matter of the newspaper reports.

20 MR. BERN: My name is Miles Bern, attorney in York,
21 Pennsylvania. I'm here with my co-counsel, Tony Berni. We
22 represent the York Daily Record as well as the York
23 Dispatch. We also represent the reporters in issue, Joseph
24 McInerney and David Bernard-Bobb.

25 MR. GRUBER: Patrick Giller for the defendant, Your

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1 BERN:

2 THE COURT: All right.

3 MR. KATHSCHNIG: Good afternoon, Eric Kathchnig
4 for the plaintiff with my co-counsel Michael Walczak with
5 the ADL, and Tom Schmitt for Pepper Hamilton.

6 THE COURT: Nice to see some of you again, some of
7 you I haven't seen previously in this litigation.

8 All right. We have this, as I noted, the motion to
9 quash filed on behalf of Mr. McInerney and Mr. Bernard-Bobb.
10 And in reviewing the submissions by the parties, it's --
11 believe that I will understand how the issues frame out, and
12 I also understand, I think, pretty comprehensively what your
13 arguments are, but let me first then turn to counsel for
14 the movants, and if you want to make an additional
15 presentation I'll certainly give you the opportunity to do
16 that.

17 MR. BERN: Thank you. Would you like me to be
18 heard?

19 THE COURT: Whenever you're comfortable.

20 MR. BERN: Your honor, I would like to say
21 something for the record initially to clarify I think some
22 use of confusion with regard to something that we had done
23 on behalf of both the newspapers as well as our respective
24 clients.

25 When we were first served with a subpoena relating

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1 to a deposition that Pepper Hamilton had served upon us, we
2 had taken the position that it was far better to try to
3 amicably resolve the matter and not have the Court's
4 intervention with respect to the issue that is before the
5 Court today. So what we attempted to do was to provide
6 affidavits wherein the reporters would acknowledge indicate
7 that if they were called to testify the nature of their
8 testimony would be to verify the statements set forth in
9 those articles and the veracity of the articles, meaning if
10 they were quotes, that is what the quotes were that they
11 took from somebody else. If they there were not quotes, then
12 that was the general information that they received when
13 they were attending the relevant district meetings.

14 Because there was an issue in fact as to whether
15 there was any subject of retractions or corrections. So
16 both reporters indicated in their affidavits that they had
17 never been served with a demand for retraction or
18 corrections. And the newspaper editors likewise indicated
19 the same. I think with one exception that being that I think
20 we made reference to intelligent design in a column in which
21 it shouldn't have been made, and corrected it in a
22 subsequent newspaper article. But it wasn't as a result of
23 laying to avoid being cross-examined. And I think that has
24 been an allegation that's been made by the defendants in
25 this case that the purpose under which we submitted the

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1 affidavits was to circumvent the issue of cross-examination.

2 THE COURT: Well, if I understand your submission,
3 and maybe I don't, what apparently you're seeking is to have
4 the -- at least for the purpose of discovery, you want to
5 have the affidavits submitted, but actually a discovery
6 deposition of your client, is that correct?

7 MR. BERN: We take the position that if the
8 affidavits were accepted by both sides, that that would
9 preclude the need to depose them. If the affidavits were
10 not accepted by both sides -- and we wrote this as
11 correspondence -- then we recognize that we would have to
12 proceed with a motion to quash because it was our position
13 that the reporters were otherwise protected by a reporter's
14 privilege and not be compelled to testify.

15 THE COURT: Well, the privilege as a concept that
16 at times is difficult to get -- for lawyers and judges to
17 get out and around. But having read the cases and
18 certainly your own submissions, we have a situation where
19 it's a hard day in terms of what the requests are.

20 It appears to me that one of the things we have is
21 a record that your clients testify concerning what they saw
22 and heard, particularly what they heard, during public
23 meetings.

24 MR. BERN: That's correct.

25 THE COURT: Now, if I understand your position is

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1 isn't necessarily that that in and of itself is protected by
2 privilege. Although I say so. I don't want to
3 mischaracterize your argument, you seem to say that there
4 could be some privilege there, I guess. But also that, for
5 example, the issue is not just that that information that
6 in some way could be obtained from others, and there's been no
7 showing that it hasn't been obtained from others. Is that a
8 fair statement?

9 MR. BENNETT: That's a fair statement, yes.

10 THE COURT: Are you taking a position that to the
11 extent the deposition would be a deposition or
12 depositions at some point would be limited to what they
13 saw and heard at a public meeting?

14 MR. BENNETT: We're saying

15 THE COURT: I used to the extent that to
16 finish and to the extent that it doesn't involve
17 confidential sources, that that's not something that your
18 clients are asserting?

19 MR. BENNETT: We've taken the position that what it is
20 that we want is protection in the sense that the defendant
21 or someone is deposing us or calling us as a witness at the
22 trial has to establish the fact that our testimony is
23 relevant and material, and that for the near past we are the
24 only parties that can otherwise testify to what it is that
25 was printed.

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1 And in this particular instance, that's far from
2 relevant. Thank you.

3 THE COURT: You do not know it's not relevant?

4 MR. BENNETT: I say it's relevant, but the issue is
5 how, and those other sources where this information can be
6 obtained.

7 THE COURT: I'm sorry, clearly there are --

8 MR. BENNETT: That's right.

9 THE COURT: Clearly there were other attendees at
10 the meeting. I don't think anybody here is contending that.
11 However, it's difficult for me to see how for, for example,
12 a small group gathering or some difficulty in fact, and
13 I understand that you can make the argument that the
14 information can be obtained from others, but the parties can
15 take the position they want to depose everybody who is in
16 the room, I suppose, and then we get into, well, they can
17 depose others first, and get to you later on. But it's
18 difficult for me to see how we implicate the privilege as we
19 call the group gathering if they're questioned about what
20 they saw and heard exclusive of confidential sources, which
21 seems to be the position you're saying they don't want to get
22 into, at least in terms of the deposition.

23 And I think the materials that were sought are a
24 different issue, and I want to ask to that. But you're
25 saying, finally, you don't want that, you don't want to

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1 subject that is dispositive about what they saw and heard.

2 MR. BENNETT: No, what I'm saying, Your Honor, is if
3 the Court determines that what you just said is how you
4 feel, then in the alternative I would ask for a protective
5 order such that if there were accusations they would be
6 limited --

7 THE COURT: I see.

8 MR. BENNETT: As what you just said, and not be
9 reduced to a series of questions that I don't think would
10 be --

11 THE COURT: I understand. All right. But you
12 particularly object to -- again, I don't want to
13 mischaracterize your argument. But you particularly object
14 to that. Those inquiries, trespassing into confidential
15 sources and other areas that would directly come under the
16 protection of the reporter's privilege.

17 MR. BENNETT: Well, let me just respond to the
18 confidential sources issue, because I can put that to bed. I
19 don't believe that there are confidential sources in this
20 case, and I'm not alleging that in my pleadings in terms of
21 the shield law.

22 THE COURT: Well, tell me. Will me if in fact the
23 Court issued an order that would allow the reporters to be
24 questioned as to, as we just discussed, what they saw and
25 heard, where do you want the line drawn?

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1 MR. BENNETT: That is where I would want the line
2 drawn, not beyond that testimony.

3 THE COURT: All right.

4 MR. BENNETT: What it is they saw and what it is that
5 they heard, and that the quotes that they made are the
6 quotes that they heard.

7 THE COURT: All right.

8 Now, let's just begin for a moment with the
9 materials sought. Continue.

10 MR. BENNETT: With all due respect, I'm not conceding
11 that.

12 THE COURT: I understand.

13 MR. BENNETT: In terms of what I just said, I'm not
14 conceding.

15 THE COURT: I understand you're not conceding the
16 point. That is for the sake of argument. And I recognize
17 what your position is, and I appreciate your candor in that
18 regard. And I know you don't concede the essential point,
19 and I want to hear everybody on this, but with respect to
20 the materials that are sought, what tends to me to be
21 particularly problematic from your standpoint are the notes,
22 reporters' notes, drafts, et cetera. Is that a fair
23 statement?

24 MR. BENNETT: That is correct. And, again, I would
25 like to tell the Court what it is they have so that we

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understand what is in issue here.

With respect to Mr. Maldonado, I believe I have run a search. That's all I have that occurred I believe in March of 2001, so almost a year subsequent to when the article in issue was printed. He has no record. All his policy to destroy notes within 30 days of the printing of the articles, so there was no notes.

With respect to Mr. Bernard Dunn, I do have drafts of the articles that were written. I have the notes that were taken at the school board meetings, in other words she retained that information, and I have that in my position.

It's my position, however, that if hypothetically she was called to testify under the guise of what you just announced, none of that would be relevant because she's testifying to what it is she heard, and what notes she took, and what drafts of the articles she prepared have nothing to do with the final article in issue to what she's testifying.

THE COURT: So you would seek to protect the article and the notes and drafts.

MR. BERN: That is correct. And if the Court took the position that they may be relevant protected upon what my opposing counsel argues, then I would ask for an in camera review prior to turning over to counsel. And I believe the defendants in their brief have likewise indicated that that may be appropriate.

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They have also raised the issue that when we had submitted our nomination, our written letter to them indicating why we were objecting on that which they were requesting by means of the motion to produce, we failed to object to several items set forth in that motion to produce as the subjects to produce, and that in essence, we didn't respond to it because we don't have it, but -

THE COURT: That would go to the, for example, the disciplinary arena, the

MR. BERN: Personnel file.

THE COURT: -- personnel file. When you say you don't have it, what do you mean?

MR. BERN: There are no personnel files. The two reporters are independent contractors. They are not employed by our paper on a per diem basis. They're not employed by our paper on a weekly basis. They're employed on a per article basis.

THE COURT: Given how comprehensive your submission was, my assumption, which now you're telling me is correct, is that you didn't respond because you didn't have those things.

MR. BERN: That's exactly right, they don't exist.

THE COURT: All right. All right, go ahead.

MR. BERN: Turning back to my arguments, and I believe the Court is now well aware in terms as to what we

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are, and obviously, you are very much familiar with the case law. We believe that there was two cases in Pennsylvania -- or rather one, in the Third Circuit, one in Pennsylvania in the Commonwealth Court, and one in the Third Circuit in Delaware, that really go to the very issue at hand.

The second case, which we cited in our reply brief, was a case wherein there were four individuals speaking, and a reporter who heard what it is then they were discussing. And the individual correction officers, who otherwise was devoted in part and suspended for some period of time without pay, had filed a complaint requesting that he be reinstated at his higher rank and receive his backpay. And he subpoenaed the reporter to testify because he thought she misinterpreted some of that which she had heard and presented it wrong in a false light that otherwise adversely affected the disciplinary action. The Court concluded that he had to first go to the other three people that were present before he went to the reporter and therefore they sustained the motion to quash.

The same kind of thing happened in the state court case. There was a trial court decision where a motion to quash was sustained. It went to the Commonwealth Court, and in *Mukhammad* the Commonwealth Court said that wherein there are other persons present at the press conference, unless they can go to the reporters, they had to first go to the

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other parties.

In this particular instance we have said in our pleadings and you have already indicated there were public meetings. There were approximately 100 persons present from the public, in addition to all the school board members, both current as well as past, and they haven't even attempted to depose the other persons from the public. They depose some of the school board members, and then they depose or they requested to depose my reporter.

The concern that I have there, Your Honor, is that I find it somewhat immaterial when in fact this particular school district decides to tape record the meetings, and therefore has in effect its own record with regard to what was stated, and then chooses to depose those meetings after the minutes are prepared, and the minutes clearly don't reflect the dialogue that had occurred. Don't cause an issue with regard to misstatements after the articles are returned, don't raise an issue with regard to misstatements after the articles are printed, and the only time the issue comes into play is after they're sued and after minutes, gets involved, and then all of a sudden everybody conveniently forgets that it is that they may have said, and now they come to the press and say what did we say or not did we say it.

And I would be concerned if, why not go to the other

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1 material of the parties, why not go to a lot of the records of
2 the phone books, past and present, before you come to an
3 opinion I think that's what their two cases are saying.

4 The reporters' privilege is such that, A, the
5 testimony that we're going to offer is in fact we have to
6 offer it has to be material, or has got to be material, it's
7 got to be relevant, and we have to be the court of last
8 resort, so to speak, and we're not.

9 And to the extent that we're basically being asked
10 to do the job that they could do for themselves by
11 interviewing other parties, I think that that's wrong, and I
12 think that that's violative of what my privilege is. I
13 think the law goes with respect to the notes. I think the
14 notes are interview privileged, unless they can prove the
15 materiality of it, the relevancy of it, or nexus. And
16 nothing in the pleadings have they come close.

17 I find it further interesting that they now raise
18 the issue in terms of how material this testimony is when in
19 fact I believe the latest day to depose parties or persons
20 discovery was July the 1st, and that's the date of my
21 deposition. And having said that -- or excuse me, I guess
22 it was earlier this month, but having said that -- the
23 denunciation of the various school board members who are
24 alleging that they don't remember saying whatever,
25 particularly Mr. Buckingham, occurred many months before.

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1 And if in fact our testimony was so terribly crucial, why
2 weren't we subpoenaed many months before? Why wasn't that
3 request made of us previously? The defendants in this case
4 are piggybacking on what the plaintiffs attempted to do.
5 And when the plaintiffs asked for a deposition, and we
6 communicated with them by means of providing that affidavit,
7 and they were willing to accept that affidavit --

8 THE COURT: Let me ask this, A. If your clients
9 did not depose, because I don't let them be deposed, and in
10 that hypothetical situation, what would have happened if
11 they're called as witnesses in the case in chief?

12 MR. FRANK: I will file my same objections.

13 THE COURT: Same basis?

14 MR. FRANK: You got it.

15 THE COURT: All right.

16 MR. FRANK: So my position being that after all the
17 the plaintiffs had indicated that they were willing not to
18 pursue the subpoena and address the issue of trial, that's
19 when defense said, you know, they want the right to
20 cross-examine as they could learn from them in terms of
21 what it is that we might otherwise testify to. For the
22 quality of this is, maybe it's going to be determined by the
23 plaintiffs that they're not even going to call us at trial,
24 so why do we need to do the deposition now?

25 THE COURT: All right.

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1 MR. FRANK: Thank you.

2 THE COURT: Thank you for your argument. I
3 appreciate it. We'll hear from defendant's counsel.

4 MR. GILLEN: Thank you, Your Honor. For Gillen for
5 the defendants.

6 A couple of preliminary matters first. I think
7 you've properly indicated that the use of the privilege is
8 confidential sources. And we have indicated that we have no
9 interest in getting it any, so it appears that is not an
10 issue. Likewise.

11 THE COURT: Well, how is it? You know, to say we
12 are not sure of what the privilege is, but certainly the
13 scope that runs through the same law, as indicated by the
14 reporter's counsel, is that there may be some obligation to
15 depose sources before you get to the reporters. What do you
16 say about that?

17 MR. GILLEN: What I say about that, Your Honor, is
18 we did not drag that into this. We had -- we understood
19 that there were witnesses. We knew there are other
20 witnesses, and we've deposed some of them.

21 When they weren't witnesses, when they were on the
22 sidelines, we were content with that. As you know, also by
23 way of the answer for our late subpoena, in May a subpoena
24 was served on them to get testimony by the plaintiffs on
25 June 1st. Naturally we expected that. We anticipated

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1 documents that would allow us to conduct a meaningful cross
2 examination of the witnesses when they offered their
3 testimony. So we didn't bring that into this.

4 Our position, the purpose of our subpoena and our
5 action to compel is very simple. It's really to issue due
6 process, fundamental fairness. If they are going to come
7 forward, if they are going to testify against our clients,
8 then all we want is a fair ability to conduct a meaningful
9 examination into their bias, their motives, et cetera.

10 THE COURT: What about the notes?

11 MR. GILLEN: The notes I think go to a lot of that.
12 I hear from the standpoint of my client's interests, giving
13 their deposition testimony, those reports were minutely
14 taken and placed things in false light. The notes are very
15 material to that.

16 THE COURT: Well, what about the privilege?

17 MR. GILLEN: The privilege -- I believe that the
18 privilege, at least so far as it's, you know, source, it's
19 clear, doesn't extend to that material.

20 THE COURT: Because?

21 MR. GILLEN: The only holding in the Third Circuit
22 that relates to that sort of secondary material is
23 in *Boyle*, and it's extremely dispositive. It was affirmed, as
24 I believe to be what is true, and it's from an oral case, that
25 those kind of notes of statements made, reported by a

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1 supposedly, are unique to him or themselves. That's what the
2 Third Circuit said, that that's right.

3 Now, I think that Cuthbertson wrongly extended the
4 privilege beyond that. And I think Judge Barber's
5 concurrence in the subsequent case, Jordan, is right. And I
6 think that at a very interesting that Malabarish did not
7 mention Robert V. Lange denied by the Supreme Court
8 shortly before Cuthbertson was decided and holding that
9 there is no editorial process privilege.

10 So my position is if they're going to be allowed to
11 testify, then that's the purpose of our subpoena, that's
12 the purpose of our examination.

13 THE COURT: Where does it show the privilege
14 affect this case at all on these facts?

15 MR. GILLEN: Not based on the representation that
16 there were no confidential sources involved.

17 THE COURT: So you say the privilege, really, as
18 its extent, applies only to confidential sources?

19 MR. GILLEN: Yes. I say that that's the holding.
20 That narrow view as what is most secure. Beyond that, the
21 issues facts the Supreme Court and the Third Circuit involve
22 it's just confidential sources, perhaps information that
23 would lead to the discovery of the identity of confidential
24 sources. Beyond that --

25 THE COURT: But we don't know. Well, of course

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1 counsel says there are no confidential sources, but I think
2 you read the privilege too narrowly. We say disagree on
3 that, and I think, again, another script that runs through
4 the courts, or at least a theme is that we can do what we
5 shilling the ability of reporters to do their work.
6 particularly if we examine their notes.

7 MR. GILLEN: The only thing I can see in that,
8 Judge, is the fact the Supreme Court considered all of those
9 questions in *Reddy v. Lange*. It said no. If those
10 reporters were statements in a defamation action brought by
11 my clients, they would have to turn that stuff over.

12 THE COURT: Well they might, but they're not.

13 MR. GILLEN: Well, I mean that's the question for
14 you to decide. But my point is, their notes are not
15 protected. I firmly believe that under the *Reynolds*
16 *Ignorance* means and in light of their holdings.

17 THE COURT: All right. Thank you.

18 MR. GILLEN: You're welcome.

19 THE COURT: Is the plaintiff?

20 MR. KALISCH: Your Honor, Harold Malabarish, ACLU of
21 Pennsylvania for the plaintiff?

22 The plaintiff's interests as I think the Court has
23 correctly identified them, are fairly narrow. But beyond I
24 get to know, it might -- I mean I would like to focus on
25 this privilege issue because I'd like to reconceptualize it.

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1 a little bit differently.

2 THE COURT: Well, you say they've waived it.

3 MR. MALABARISH: Well, it is an argument in there, and
4 how this works out in practice if we don't get the
5 affidavit in, and whether the reporters get called at
6 trial.

7 THE COURT: I'm not sure the records tell were good
8 about your argument that they've waived it, but you've made
9 that argument nonetheless. Is that right?

10 MR. MALABARISH: We have, Your Honor. We also argue,
11 as I will in just a minute, that the information we're
12 seeking stops at the line of privilege.

13 Just from the comments I've heard it seems to me
14 that it is appropriate and makes sense under the law to look
15 at it as two separate privileges related to news reporting.
16 One is the confidential source privilege, which is quite
17 clear, everybody understands. The other is a news gathering
18 privilege. And, again, Cuthbertson is really the leading
19 case on that. And on page 147 the Court writes, We hold the
20 privilege extends to unpublished material in the possession
21 of CBS.

22 So that there's the confidential source privilege,
23 and there's the news gathering privilege, which gives the
24 media that sort of -- that breathing space, and it could be
25 analogized to an attorney work product privilege.

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1 THE COURT: And part of the rationale, obviously,
2 as I just stated to Mr. Gilen, I think the rationale has
3 the tendency to shift efforts by the media to do their work.
4 Is that not correct?

5 MR. MALABARISH: That's absolutely correct, and
6 that -- and that is the justification. And with all due
7 respect to Mr. Gilen, who we've gotten to know quite well,
8 I don't think that his statement that Cuthbertson is kind of
9 way out there on the fringe is correct. In fact --

10 THE COURT: What is it that you want? Let's say to
11 line up first of all --

12 MR. MALABARISH: Very briefly, Your Honor, in our
13 complaint filed on December the 14th, we alleged on page
14 that our defendants made numerous statements at public
15 meetings, as agents of the defendant, Mr. Buckingham
16 privacy, head of the *Massachusetts* Committee.

17 THE COURT: I understand.

18 MR. MALABARISH: For instance that, "We need to
19 balance the teaching of evolution with creationism. This
20 country wasn't founded on truth telling or evolution. This
21 country was founded on Christianity, and our students should
22 be taught as such." That's at paragraph 24.

23 Paragraph 25. "2000 years ago someone died on a
24 cross. Can I suggest take a stand for him?"

25 And those comments are important under the *Reynolds*

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1 met. Am I remember back in February or March your Honor
2 had some question about whether Lemon is now applicable
3 test. It's noted in a quick reading of the summary judgment
4 notes defendants filed last night, they are now conceding
5 that Lemon is the applicable test. And I think under
6 ordinary summary judgment AUC that's probably right. We don't
7 need to decide that today.

8 THE COURT: No, we don't. We'll have a lot to say
9 about that.

10 MR. MALHEAR: And I want to just take this
11 opportunity to apologize because it's not as if we don't
12 have enough interesting constitutional issues in this case,
13 and now we have additional ones that are coming to light
14 today, and we kind of got us into this. But the reason this
15 has become so important and this has become an issue is that
16 these documents are important to the plaintiff's case, they
17 go back to the purposeful prong, and the effects prong.

18 THE COURT: Well, I understand that, but let me try
19 to make sure that I understand, and I recognize what it is
20 that you're saying and why you need to say it, but my
21 question is fairly basic. If I understand Mr. Malheur, the
22 defendants seek pretty much unfettered ability to not only
23 conduct an examination of the records, but also to get into
24 the records, and I suppose, Mr. Malheur, can a media as well,
25 to the extent that they're relevant to the proceedings.

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1 Now, do I understand that you stop short of the
2 notes and the media. I want to just make sure I
3 understand everybody's position -- and you have the ability
4 to respond, or you can not, and that's what I'm trying to --

5 MR. MALHEAR: Well, it depends on how all this
6 plays out, but just -- let me just explain historically. On
7 June -- on January 17th we began taking depositions of the
8 defendants. And somewhat to our surprise, one by one they
9 uniformly denied the quotes attributed to them in the two
10 different newspapers. And, you know, and it wasn't the
11 wording is about, we never used the word "conspiracy" at any
12 public hearing. So there really is a factual dispute there.

13 Under rule 802(b), I believe it is, these newspaper
14 articles are self-authenticating in that respect. And
15 but we still need to lay a foundation. And the only thing
16 we need from the newspapers is the ability to lay a proper
17 foundation so that we can use those newspaper articles into
18 evidence. The affidavits that the reporters and that the
19 editors have given to us, and the stipulation that in fact
20 was signed and submitted to court covers everything we're
21 looking for.

22 THE COURT: So do I understand then that to my to
23 answer the question that I asked you, that Mr. Malheur
24 obviously wants to depose these two reporters, but he
25 cannot to stand on what you have, but if there is a

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1 deposition you're going to win let?

2 MR. MALHEAR: Your Honor, that is correct. We are
3 content with what we have now. If we don't get the
4 stipulation entered as you were types of affidavits in, which
5 I don't believe we can get it without defendants' consent,
6 then we would want either to participate in the deposition
7 to ask the foundational questions, and I can -- I can give
8 assurance to the court that's the only thing we would ask
9 unless there's some reason to substantiate or something
10 comes to in the examination. So, again, I can't promise
11 that we would stop at that point.

12 THE COURT: All right, I understand. All right.

13 MR. GILLEN: Your Honor, may I respond briefly?

14 Don't think the newspaper articles are relevant. I
15 mean there are not Malheur's --

16 THE COURT: Well, not going to argue evidence.

17 MR. GILLEN: Okay, I understand.

18 THE COURT: The admissibility and the self
19 authentication, I'm not --

20 MR. GILLEN: Very well.

21 THE COURT: We don't need to discuss about that
22 today.

23 MR. GILLEN: That's fine, and I accept that, your
24 Honor.

25 That said, the next thing is, you know, it's an

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1 content to my clients that the reporters can come forward
2 and collectively testify and not be exposed to meaningful
3 examination.

4 As you know, opposing counsel's intention, many
5 prosecutors have been attributed to my clients which they
6 did not deny. They believe statements were taken wholly
7 out of context, words were put in their mouth. That is
8 their testimony, and I've shown you that. And what's more,
9 the reporters say as you were talked to us about it. That
10 is not the testimony in front of you from the deposition.
11 They say we went to them, we tried to get a fair hearing and
12 we didn't.

13 So from their standpoint, the notion that the
14 reporters have a limited right to come forward, you know,
15 say what they like and should that, that -- the process and
16 their notes have any meaningful scrutiny, that is an
17 affront. That would suppress them of due process. They need
18 a chance to really examine them. What do those notes say?
19 What words were used? What statements were omitted from the
20 articles? I think that's part of the concern of my clients.

21 Treating them as a man that was largely put into
22 their mouth by those reporters. There were times when they
23 said under the defense argument, maybe they misquote because
24 maybe we're changing them with that. That's not the point.
25 These statements they were laid out. We want an opportunity

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1 to look at those passages, to look at the verifiability, and to
2 examine what else was said. Otherwise, without knowing
3 what's in the notes, there could be other statements there
4 by third parties and so on that are highly relevant to our
5 defense. It's kind of peekaboo discovery. We stand up and
6 say yeah, what I said is true, and we have to settle for
7 that. Judge, that would be fundamentally unfair.

8 THE COURT: Let me ask Mr. Weissen, do I understand
9 your position to be that all other things being equal, if
10 the reporters would not be depicted at this time, and, for
11 example you would stand on the stipulated affidavits, that
12 nonetheless you would intend to call the reporters in your
13 case in chief, or at least in terms of right?

14 MR. WEISSEN: Let me put it another way. It is our
15 intention, and there's just no doubt, it is our intention to
16 introduce the full panoply of newspaper articles into the
17 record. And ultimately it would be your Honor's ultimate
18 call whether or not the stipulations or the affidavits could
19 move it. I have --

20 THE COURT: So you would only call them, if I
21 understand correctly, if you couldn't get a stipulation as
22 to the admissibility of -- as the admissibility of particular
23 articles when you say under the rule self authentication and
24 we need not get to that, I don't think, today.

25 MR. HANCOCK: No, it's not just the authentication.

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1 with the foundation that in fact what was reported there
2 is -- that they were present, and it was accurate.
3 MR. COLE: But there was a certain set of
4 stipulations or facts that would cause you not to have to
5 call the reporters in aid of your case in chief. There's a
6 certain set of circumstances that would cause you to have to
7 call the reporters. And if I understand your argument
8 -- that, quite frankly, and your position that the privilege
9 has been vitiated by the affidavits of the reporters,
10 that would go to, it goes to the, your ability to call the
11 reporters during your case in chief if you actually had to
12 do I have that right?

13 MR. HANCOCK: Yes, plus, one, there is a -- rather
14 than vitiated, I would say actually a waiver here, but
15 the second --

16 THE COURT: You allow a word by me?

17 MR. HANCOCK: We have great respect for the press.
18 I don't want to encroach on any of their rights. But the
19 second point is, that between Riley and Gubberson in the
20 Third Circuit, the privilege extends either to confidential
21 sources or to unpublished materials editorial process.
22 Every court that has looked at it says it does not extend to
23 published information, and so if we were to call them, it's
24 the -- there either is no privilege or it's waived, and we
25 would call them at that and simply ask, did you write these

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1 articles, were they based on firsthand information, was they
2 accurate, have you gotten any corrections or instructions,
3 thank you very much, that's the end of it.

4 THE COURT: All right, I understand.

5 MR. GILLEN: Judge, if I may, my position is, if
6 those affidavits, other information from those reporters is
7 going to be used against my clients, then you've got to give
8 me a chance to look at the material I've asked for just out
9 of fundamental fairness.

10 THE COURT: Give you a chance to do what?

11 MR. GILLEN: To examine them about what they say
12 and heard.

13 THE COURT: I understand. All right.

14 MR. GILLEN: The notes they took there.

15 THE COURT: You want look at materials, I'm --

16 MR. GILLEN: Materials I've requested, the
17 materials I've subpoenaed.

18 THE COURT: Let me ask Mr. Benn, on the issue of
19 what apparently are a set of e-mails and the notes and
20 drafts, a e-mails in the case of your own client and notes and
21 drafts in the case of the other, how can I give them out of
22 evidence without looking at them?

23 MR. BENN: Oh no, I'm proposing that, when I'm
24 saying to you, Your Honor, is that it wasn't some question
25 on your part that maybe they're admissible, that I would

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1 respectfully request that you look at them in camera,
2 determine the relevancy, and if they are relevant and you
3 make an order to that effect, I'm going to have to live with
4 that.

5 THE COURT: I understand.

6 MR. BENN: But in the alternative if you determine
7 that there's not relevant, I don't see any basis to turn
8 them over to anybody. I think they are protected.

9 THE COURT: I think under the case law, however,
10 it's less than clear I think we are all agree, and I think
11 it can be argued different ways, you may see it differently,
12 it is problematic for me to, right or wrong, simply say that
13 the notes and drafts and e-mails come under a privilege
14 without an examination. It is probably better for everybody
15 if the Court conduct some in camera examination, it seems to
16 me.

17 Now, how do you propose that I do that?

18 MR. BENN: Well, that's what you do next week.

19 THE COURT: I think what I would suggest to wrap
20 this up is -- go ahead.

21 MR. BENN: Before you wrap it up, I would like to
22 have comment with regard to arguments of both counsel.

23 THE COURT: By all means.

24 MR. BENN: Defense have waived in their pleadings
25 and in their brief that -- and in their argument that the

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1 reporters have been placed in terms of the reporting. I
2 need the Court to be cognizant of the fact that Look has two
3 newspapers, the Look Daily Herald, which is owned by Media
4 News Group, and the Look Dispatch, which is run by Robert
5 Mark Allman. They are two separate distinct newspapers,
6 two separate editorial staffs. They have nothing to do with
7 the other. And it should also then when alluding some
8 element of conspiracy here as it relates to the two
9 reporters because the reporters wrote two separate articles
10 for each meeting they attended, and typically they all
11 heard the same thing.

12 THE COURT: I understand.

13 MR. NUNN: That's number one.

14 Number two, I believe that counsel has indicated
15 that when used the word "conspiracy" and that that never
16 came out of the actual words number's mouth and that that is
17 part of what this motion is in terms as to the language we
18 used in our article. Not to suggest that you need to get
19 another person in this case, but there is a fax of record on
20 the Internet where Mr. Buckingham is interviewed and
21 specifically used the word "conspiracy".

22 Thank you.

23 THE COURT: How does that help me today?

24 MR. NUNN: Well, I think it demonstrates somebody's
25 argument.

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1 THE COURT: And I and I take those somewhat
2 auxiliary points as arguments, and I'm not sure that they
3 are helpful to me today. Everybody has got a position. The
4 position obviously the defendants have is that certain
5 things haven't said, and they don't have the ability to
6 describe the reporters on those units, I recognize that.

7 MR. NUNN: But again, and this will be my final
8 statement, I promise you, although there's usually during when
9 it comes out of a lawyer's mouth, if the argument is that my
10 clients wrote whatever and it was contradictory or not in
11 conference with or not exactly what was said by the board
12 members, again my position is, very clearly, that there were
13 other independent parties not associated with the newspaper,
14 not associated with the school board, but rather members of
15 the general public, parents of students that attended those
16 school board meetings, they are the sole possessors of the
17 names of those individuals because they maintain the sign-in
18 list, and those parties I would presume would likewise be
19 able to eventually state what it is that they heard, saw
20 and experienced.

21 THE COURT: I understand.

22 MR. NUNN: I'm sorry, Your Honor.

23 THE COURT: We'll have to end this sometime, not
24 give you a couple more comments.

25 MR. NUNN: We started down the road of, is this

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1 information really necessary, and I think Mr. Nunn is
2 correct, that in order for plaintiffs to value of the
3 parties to overcome that privilege, we have to show that
4 it's really necessary, that it can't be gotten from other
5 sources.

6 Just to have this Court is thinking that maybe some
7 of this should be dispositive, the plaintiffs would focus on
8 a statement in Caraberran that they said referring to TV
9 tape, there are unique bits of evidence that are frozen at a
10 particular place and time.

11 And yes, it's true we have several other witnesses
12 including plaintiffs who will come in and say we were at
13 those meetings and, yes, we recall statements about
14 questioning, we recall statements about Nixton's behavior, we
15 recall statements about testimony, but that is all based on
16 recollection. What we have here is contemporaneously
17 recorded statements; and that is unique. No other
18 individuals can testify to that.

19 Also, and I don't know if Your Honor has had a
20 chance to read McCreary County versus ACLU yet, but the
21 Court goes to great lengths to talk about most of the
22 details of the situation, what is the environment; and when
23 the reasonable observer looks at a situation, do they
24 perceive an endorsement of religion. So you have to really
25 look at the historical record, those news reports in

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1 totality are part of the historical record. So this is --
2 this is unique evidence that's really important in this case.

3 MR. NUNN: If you won't let me use the word
4 "dispositive," I won't let you use the word "unique".

5 MR. NUNN: Thank you.

6 THE COURT: Last word.

7 MR. NUNN: Thank you, Your Honor. Two things.
8 With respect to the sign-in sheets, they do exist. Plainly
9 they're unreliable in this case, there's a handful of
10 signatures on each one. They've been produced. There are
11 meetings at which I know some people say 10 or 100 were
12 present.

13 THE COURT: I understand.

14 MR. NUNN: Second, if the sign-in sheets are to
15 be created by manual for the reporters, I mean, it's not
16 as all show that reporters were present at all of the
17 meetings, and it's -- It wouldn't be the first time that
18 reporters looked at each other.

19 I mean, I don't want to say that that somehow is
20 wholly improper, but I cannot foreclose that there was some
21 cooperation necessary.

22 THE COURT: I understand your position, Mr. Nunn.
23 I take the issue you argue it, the more you're going to
24 lay another argument from Mr. Nunn, and this will become
25 unclear.

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MR. BENN: I have several for that one.

THE COURT: I had you do.

I would like to examine the -- and I think it's important upon me to examine the e-mails and the notes and drafts, and I guess we can do it two ways. Mr. Benn -- we can either have you file them under seal or we can have you simply provide them for an in camera inspection. I would prefer the latter, I think.

MR. BENN: That's what we'll do.

THE COURT: Why don't you provide those to me, in my chambers. I would say -- well, how long is it going to take you?

MR. BENN: Can I give them to you next Tuesday?

THE COURT: Let's say by the close of business Tuesday, that will be fine. And I will conduct an examination in camera and rule then pursuant to my request heard today and the submissions of the parties and my examination of the materials.

Now, let me -- before we move this portion of today's proceedings, Mr. Gillen, do you accept -- do we have any issue with respect to Mr. Benn's assertion that, to the extent you don't get anything wrong, it doesn't exist?

MR. GILLEN: Certainly. It's not going to explain his integrity. If he says there are no comments that exist, Your Honor, I have to be content with that.

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THE COURT: I simply don't want to have another proceeding at a session in usual or some other vehicle. Because you say that you're entitled to something that you don't get. It seems to me that the only materials requested as a portion of your subpoena of the individual responses that exist according to Mr. Benn are the e-mails and the notes and drafts. All other matters, including the employment records to the extent that those are independent contractors, simply don't exist. So speak now or

MR. BENN: Well, I would say

THE COURT: -- hold your peace.

MR. GILLEN: Judge, and I thank you for the opportunity. I think that everything we've asked for is proper. To the extent of Bennett's assets, I have noted that, and that's represented to us by counsel for the parties.

THE COURT: Have you represented that formally other than perhaps on the record today?

MR. BENN: The first time that I represented there, it doesn't exist is in today's argument. I can do it in a letter.

THE COURT: I think you should do that we're all clear. And I think Mr. Gillen certainly respects your integrity, it's about, but I think you have to spell it out and so that everybody understands. So then the in camera inspection of those matters that we just spoke about would

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enforce for the materials sought via the subpoena. We've have that, and we have the actual issue of the authenticity of the responses and, if so, what the limitations are.

MR. BENN: There's one other thing that I have an issue with, that I didn't mention earlier because it's a letter from Mr. Bennett, who I believe was the current board president. He wrote a letter to the editor that he asked to be published. So I have that letter together with the letter that he wrote that we wanted published together with the editorial that was published.

THE COURT: Are you going to turn that over?

You're going to submit that to me?

MR. BENN: That's all I have, and I'll give you what I have.

THE COURT: What is the problem with turning that over?

MR. BENN: I don't have a problem with it.

THE COURT: Why don't you just turn it over. I don't think it's helpful to have me review something that you, under the circumstances, would appear to be unwilling and in their possession anyway likely, as I would -- perhaps when you send your message to Mr. Gillen that indicates what you have and what you don't have, you ought to just send it.

MR. BENN: I'll send it to both counsel.

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THE COURT: -- to both counsel, to all counsel, to the many counsel we have in this case, copy to everyone.

MR. BENN: You're dealing with some unusual that I

on

THE COURT: No I am. Anything else before we close the record on this portion of the proceedings? All right.

Then we'll excuse you. That concludes --

MR. BENN: Thank you.

THE COURT: Thank you, Mr. Benn. Let's take counsel I guess for the Foundation for Thought and Ethics will take their seats.

While you're setting up we'll take five minutes and I'll be right back.

THE DEPUTY CLERK: All rise.

Adjourned. A recess was taken from 12:12 p.m. to 1:01 p.m.

THE COURT: Part two of today's proceedings is the application for intervention filed by the Foundation for Thought and Ethics for the plaintiff, and the defendant. Obviously we have the same counsel.

Counsel, would you enter your appearances for -- on behalf of the applicant.

MR. GILLEN: Yes, Your Honor, Dennis Davis on behalf of Foundation for Thought & Ethics.

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MR. BOYLE: Good afternoon, glad to see you.

THE COURT: All right, come in now you.

MR. BOYLE: All right. You filed the application. This is understanding that you may have some testimony that you want to present.

MR. BOYLE: That's correct, Your Honor.

THE COURT: You may proceed.

MR. BOYLE: At this time, Your Honor, I would call Jon Buell, the president of the Foundation for Thought and Ethics.

THE COURT: OK.

Calling as a witness of behalf of the defendant, having been duly sworn or affirmed according to law, testified as follows:

THE DEPUTY CLERK: State your name and spell your last name please for the record.

THE WITNESS: My name is Jon Buell. Jon A. Buell. J-O-N-B-U-E-L-L.

THE COURT: All right, you may proceed.

DIRECT EXAMINATION

BY MR. BOYLE:

Q Mr. Buell, what is your current address?

A 6801 Rogers Road, E-M-E-R-S Road, Dallas, Texas, 75248.

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Q And by what are you currently employed?

A I am employed by the Foundation for Thought and Ethics.

Q And what is your position there?

A My position is as president.

Q And prior to working there where did you work?

A I worked at Probe Ministries prior to the Foundation.

Q And how would Ministries a publication type ministry?

A Lectures in classrooms, but publications as well, and I was the editor of the publications.

Q Okay. What is the Foundation for Thought and Ethics?

A The Foundation for Thought and Ethics is organized to promote freedom of choice for young people in law, education, especially as it relates to matters of moral view and philosophy and character and the like.

Q Now about with respect to education?

A And with respect to someone, who had a burden that - that natural - that - I'm sorry, that intelligent man, which is so at home in various branches of science, might also extend to biology.

Q And how does the Foundation for Thought and Ethics relate this job, this mission?

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A Well, we've organized some scientific symposia and we do some teacher training, but primarily through publication of supplemental textbooks for the public school classroom.

Q And where does the Foundation for Thought receive its support from?

A Well, we sell our books, market our books to the schools.

Q What percentage of your income comes from marketing books?

A Well, at this point it's probably about 40 percent.

Q Is that a growing percentage every year?

A Yes, it is.

Q And why is that?

A Well, because in order to really make independent study and not making textbooks with teachers' prescriptive, you have to have a package of product. And as we - at this point we don't have as much product as the average publisher does, so we have to produce more product which would be text - supplemental textbooks and teachers guides and peripherals that make them attractive and easy to use for the teachers. And as we do that, we accomplish that, then we'll have more steps and be able to contact more schools.

Q Okay. Is the Foundation for Thought and Ethics a

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religious organization?

A No, it's not.

Q What kind of organization is it?

A Well, it's an educational organization.

Q And does it seek to provide any - promote any Christian message in that education?

A No, it does not.

Q Any religious message at all?

A No, none at all.

Q Your normative charter mentions a Christian purpose, does it not?

A The mission of incorporation.

Q Okay. And when were they founded, what --

A They were - they're -- I think it was 1980.

Q And since 1980 have you operated as a Christian organization at all?

A Not at all. We have, you know, a 25 year plus track record of what we've done, which does -- you know, about you can easily compare or look the Christian activities, it's not there.

Q Do you seek to promote any sort of ideological message in any way?

A No, we don't.

Q Do you publish any you familiar with the book "Pandora and People"?

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A Yes.

Q What is your relationship to the book Pandas and People?

A Well, we were the publisher of Pandas and People.

Q And what is Pandas and People?

A It's a book designed to supplement basal biology textbooks in public school classrooms and present the scientific rationale for intelligent design.

Q I guess we haven't been clear on what a basal textbook is.

A A basal textbook is a textbook that's designed to cover all the material in a course. Each school has its required textbooks, so you really, of what has to be covered in American history, what has to be covered in biology, et cetera, and so a basal textbook is going to face on the market in that state according to how much -- if it has a large percentage or all of those benchmarks so that the teacher can use that basal textbook and be fulfilling his responsibility.

Q And how would a supplemental textbook like Pandas and People be used in that situation?

A Well, the layout of Pandas and People is -- follows the -- typically follows the basal textbook. So we want it like for our book to be used during the entire lesson, but practically speaking many people, many teachers will take it

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and use it to say a few more minutes. So it's flexible.

Q And what is the rationale for Pandas and People? What is the -- why is it necessary?

A Well, it's different because it presents the view of intelligent design. And the view of intelligent design is that -- it's the view that intelligent cause, which we see at home in various branches of science, examples would be the human for evolutionary intelligent intelligence, intelligence, science, archeology, in all of those branches of science we're very much at home in searching for, recognizing and having confidence that we can identify the product of intelligence.

Q Now, it's taking that term -- that same kind of confidence and that same purpose and looking for evidence on biology. When we look at biological organisms and especially their genomes, we recognize the same intelligent cause. And because we extend a uniform application of the principles of science, there's good warrant to say that this intelligent -- this designed entity is the product of intelligence. So it's a plausible warranted hypothesis when we look at the information that we see.

Q Now, prior to deciding to engage in the project that resulted in Pandas and People, did you do any marketing studies or any studies for secondary markets?

A Yes, in fact, when we were doing our first book

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about the Pandas, we engaged a professor actually who was a former professor of anthropology on a doctoral level at SMU, Southern Methodist University, who had a polling business. And we engaged him, he was a Darwinist, we got with our and diagnosed questions and let him ask our questions and he asked them, and then conducted a poll. And the results were all turned over to him and he gave the computer center at SMU to draw a large number of conclusions. And it showed a very strong, a very high percentage of interest among biology teachers -- this was all biology teachers in having textbook or curriculum help and assistance in teaching a hypothesis that was an alternative to Darwin's.

And it also asked the question, if there is a dominant hypothesis and a secondary hypothesis, which should you teach. And the options given to the teachers were, just teach your personal viewpoint, teach the dominant hypothesis and the secondary hypothesis, or teach the dominant hypothesis, teach the dominant hypothesis. The overwhelming majority said teach both, 70 some percent.

Q The individual who conducted this study for you, was he a Darwinist?

A No, he wasn't.

Q And you referred to him as a Darwinist?

A No, he was a Darwinist.

Q Perhaps we should define that term for the court.

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A The term Darwinist?

Q Yes.

A Well, a Darwinist is one who adheres to Darwinian or neo Darwinian evolutionism.

Q So who then was commissioned to write the book Pandas and People?

A In the authors of the book were Dr. William Harvey who had authored -- previously an authored books -- major books of biology with McGraw-Hill and K. T. Saunders in his book with Claude Wilson, published by H. M. Saunders in the best selling, most widely used college level biology major's major textbook in the world.

And then John Koryan was the other co-author. And Dr. Koryan was the co-author of the best selling book on the origin of life prior to our book, previous, the book before Pandas. And it also was a reference book, and it was called Biochemical Foundations. And Dr. Koryan was recognized as one of the top, you know, five or ten origin of life researchers in the world.

Q So this book was written by individuals who were biologists by education?

A Biologists and origin of life researchers.

Q Okay. After the book was prepared was it submitted for peer review?

A Yes, it was extensively.

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- Q Would you submit it just to Christian scientists or --
- A Oh no. No, we sent it to -- we sent it to people who we had reason to believe might be receptive or in agreement. We sent it to people who we knew were not would not be receptive to it. We sent it to people because of their academic credentials in a history of science. It was an extension project, certainly lasted over a year, working -- just working in terms of the input of the peer review.
- Q And what did you do then when you got the results of the peer review?
- A We would take -- the peer review informed [sic] the final edit of the book in a very serious -- to a very serious degree.
- Q When was Pandas and People first published?
- A It was first published in 1989.
- Q And how many books have been sold since that time?
- A Somewhere between thirty-five and 38,000.
- Q And what has the average price of a book been?
- A Well, the average price over that lifetime has been -- the average discounted selling price, not the retail, has been between \$12 and \$13. For practically the current print run is -- the price was adjusted, the retail is \$14.95. So the average selling price in this case is

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- 16.22.
- Q And how many books do you have remaining to be sold?
- A The supply?
- Q How many books do you have in inventory to be sold?
- A Oh, about 1000 copies.
- Q And is there another edition of the Pandas and People in the works at this time?
- A There is, yes.
- Q And what is that, the title of that book?
- A The title of that book will be The Design of Life.
- Q Had you seen that earlier than Pandas and People?
- A Well, when the second edition of Pandas, you know, came out about 15 years down the road, and of course the debate has remained a great deal. A lot of criticism has been done, and so it's been necessary to update quite a bit of material. A lot of the original Pandas will be retained, but a lot will be revised, and we've added three authors. They're certainly among the top intelligent design scientists in the world.
- Q When do you anticipate this book being released?
- A Next year, in '06.
- Q And how many -- how many books will you produce in your first printing?
- A We'll print 10,000.

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- Q Do you anticipate any printings of that book after the first?
- A We certainly hope so. We anticipate, you know, anticipated or wants to keep it, you know, the first print run, especially if it's a small one like that. So of course we hope that there will be more print runs like Pandas before it, and anticipate that, but, you know, in terms of our financial responsibility, we have to be conservative and do a small print run.
- Q Are Pandas and People and The Design of Life both based upon the rejection of intelligent design?
- A Yes, they are.
- Q You would a potential determination regarding intelligent design to religion affect the sale of Pandas and People and The Design of Life?
- A Oh, it would be -- it would be catastrophic for the sales. It would be -- would take their book examination. The teachers would not buy it. It would not be used in the classroom. The market for which the book is being prepared would just effectively evaporate.
- Q And the market for who the book is prepared, whom is that, what is that market?
- A That market is in high school biology classes, AP biology classes, and in some introductory level biology in college.

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- Q How would a decision affecting the sale of that book affect FIS -- or those books affect FIS?
- A Well, we've several years into the process of preparing this book. It would be a dramatic hit to FIS and could go to our viability -- probably would, because we've been working since 1996 to develop this book. We've involved a lot of, a lot of scientists. And in addition to the economic hit that it would provide for us, it would be a very costly experience for other authors that we might approach in the future to ask them to write for us, to see what's happened to this book.
- Q And what would the total figures that you've calculated for loss be, just from -- through the first printing of Design of Life?
- A The revenues for the first printing of the Design of Life would be \$10,000 plus some.
- Q And when you add that to the other costs that you have, or estimated you have, what would the total loss be?
- A Well, we have, as I say, 1500 -- roughly 1500 copies of Pandas presently which are all sold or -- let's say, 1916, excuse me. And then the next print run of Pandas will sell at a little bit more. So the remaining present remainder of the present print run and the next print run together would total \$75,000 in revenues, projected revenues. And then when you add that to the 100

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1 plus thousand dollars, \$110,000 for The Design of Life,
2 we're talking now \$24,000.
3 Q Mr. Russell, what is intelligent design?
4 A Intelligent design is the view that, just as
5 intelligent causes are well accepted in branches of science,
6 and I mentioned this a while ago, that forensic science and
7 the search for extraterrestrial intelligence or SETI, and
8 you might mention the hypothesis of panspermia in the movie
9 Contact that was about Carl Sagan's work and he finally, those
10 were the implications, the ramifications of SETI, as well as its
11 archaeology.

12 These branches of science are very accustomed to
13 and comfortable with the reluctance to identify the product
14 of intelligent design. And so if we take that same
15 rationale and we start with the assumption that in
16 biological organisms, in the universe, there is essentially
17 highly organized, mathematically highly intricate
18 organization along the spine of the DNA molecule, so that
19 the genome as a whole is something that makes, that supplies
20 our mind. So this would be I think a good starting place
21 for the definition of intelligent design.

22 Q Would you say that the making of things is evidence
23 of intelligence?

24 A Yes, I would. I would -- I'm not sure if this is
25 advisable or not. But recently in the press it was widely

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1 reported that the famous Harvard biologist Anthony Flew,
2 throughout a lifetime of accepting atheism, he had been in
3 a symposium in Dallas in 1980. He was then in touch with
4 intelligent design scientists, read several of them, and he
5 had -- he came out in the press, I think in New York Times,
6 and he said this. He said a lot of his friends are going to
7 be very angry with me that I'm doing this, but he said, I've
8 always said that you follow the evidence wherever it leads,
9 and that's what I'm doing. And he put his finger on the
10 central argument of intelligent design, that DNA molecule,
11 was the highly unexpected improbable assumption of the
12 coding of the code on the DNA spine. And he said that
13 is -- that persuaded me. He won't say that the agent, the
14 intelligent agent is even personal, and he doesn't accept
15 the God of the Bible, he doesn't accept the God of the
16 Quran, but he says, it is impossible to be. And so he's
17 changed, or an 87 year old man, he's thrown out his atheism.

18 Q Now, you say that the theory originates, or the
19 rationale originates with scientific observation.

20 A Yes, in some, it originates with this observation
21 that it is made in nature.

22 Q And then ultimately it is a conclusion from that
23 observation?

24 A Yes, it is. It's a conclusion. Once you realize
25 that we have artificially removed intelligent cause from one

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1 branch of science. In various in several others, it is
2 more necessary as we saw evidence of intelligence in another
3 branch of science, it would be welcomed overnight, but in an
4 artificially removed from Biology.

5 Q What does intelligent design tell us about who the
6 creator or designer might be?

7 A Well, first of all, intelligent design can't tell
8 us anything beyond intelligence. If you accept the well
9 accepted principles of logical thinking without which
10 science cannot be done, the principles that were given to
11 us by David Hume, philosopher David Hume, then you realize
12 that science cannot go from the material realm, from
13 phenomena of the material, to the supernatural. And this
14 is -- this is an inherent part of the teachings of David
15 Hume that have been -- that were accepted into science at
16 that time, the stage that it was, and have been a part of it
17 ever since.

18 Q Can you tell us if this, this intelligence is a
19 natural or supernatural event?

20 A No, intelligent design cannot tell us whether it's
21 natural or supernatural.

22 Q Is even personal in nature?

23 A And it can't tell us if it's personal.

24 Q Or even if it will exist?

25 A That would be right, yes.

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1 Q Are you familiar with creation science?

2 A Yes, I am.

3 Q What is creation science?

4 A Creation science was defined in the mid '80s by the
5 National Academy of Sciences in their booklet, Science and
6 Creationism, a view from the National Academy, an outlining
7 three teachings. Number one, that creation occurred
8 sometime between six and ten thousand years ago; number two,
9 that it was a supernatural creation, simultaneously creating
10 all of the life forms independently of each other, including
11 man and number three, invoking flood geology as
12 necessary to explain the order of the fossils in the
13 fossil record.

14 Q Now, does creation science begin, as I pointed
15 out, scientific observation or something else?

16 A To begin with the observation of the complexity of
17 the information in the genome.

18 Q Creation science.

19 A Oh, I'm sorry, I'm sorry. I was thinking
20 intelligent design.

21 Would you rephrase the question?

22 Q Does creation science begin with scientific
23 observation of the natural world --

24 A No, creation science --

25 Q Or is it

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1 MR. RETSCHLAG: Your Honor, objection. Counsel is
2 leading the witness continuously.

3 THE COURT: Well, I'm going to allow some leading
4 in the interest of time. But I want to say that -- as Mr. Ret-
5 schlag has objected, I will say I'm not sure,
6 normally, with all appearance and due respect to your
7 efforts to be as comprehensive as possible, under Rule 26,
8 I'm not sure how this line of questioning helped me.
9 Enlighten me.

10 MR. RETSCHLAG: Your Honor, we have to show -- as the
11 Court is aware, there are several things we have to show,
12 one of which is the interest in the litigation that is not
13 being presented.

14 THE COURT: Well, you have to show timeliness, you
15 have to show the significant legal interest.

16 MR. RETSCHLAG: That's correct.

17 THE COURT: You have to show the importance of that
18 interest, and you have to show the lack of adequate
19 representation by existing parties, at least as far as
20 as of right, which is apparent that we are not dealt by this
21 line of questioning.

22 So I'd ask you to move through this and try to get
23 to the other parts. I'm particularly interested in
24 timeliness. I'm interested in the area of lack of adequate
25 representation by the existing parties as well.

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3 So -- and I don't -- I don't want to dramatically
4 limit your case. You have to do what you have to do. I
5 recognize, but you should know through this.

6 MR. BUELL: I understand, Your Honor. I think that
7 does go to the adequacy of representation and the different
8 interests between the school board.

9 THE COURT: All right.

10 MR. BUELL: In evidence we've heard that the
11 plaintiffs are alleging that the school board had a creation
12 science policy. Apparently there are public supports where
13 the Iowa creationist and evolution were used to justify the
14 policy. And that, we still insist, in the interest that the
15 defendants have to defend in this particular case. Our
16 interest is more academic and more a financial interest
17 manufacturing intelligent design.

18 THE COURT: And I don't think that -- a great deal
19 of that does not seem to be controverted. And I'm not sure
20 that there is a consensus contention that some sort of a
21 test could be left.

22 Now, there is an issue as to the matter, and I
23 recognize we're going to hear cross examination, and there
24 will be points immediately made as to that. But as to your
25 line of questioning that deals with the broader principles of
26 intelligent design and the subject of the Ponder and People,
27 I think the Court is pretty familiar with a lot of these

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1 Awww. And I'm just saying, I think you can move through
2 and build the record you think you need to, but I'm --

3 MR. BUELL: All right through.

4 THE COURT: -- I'm not sure that you need to stay
5 in this area that long.

6 BY MR. BUELL:

7 Q What was the difference between creation science
8 and intelligent design?

9 A Well, creation science, the driving impetus is to
10 affirm the genesis narrative in the Bible. And the driving
11 impetus in intelligent design begins with observation,
12 observation of the genome, and the obvious product of
13 intelligence that we see in living systems. So --

14 Q And these prominent scientists who agree with the
15 theory of intelligent design?

16 A Oh yes.

17 Q Could you give us an example?

18 A Well --

19 Q Prominent scientists who are not Christians, at I
20 didn't make that clear.

21 A Dr. David Houder and Charles W. Keeler published
22 together an article in the Journal, a technical journal,
23 called Science. The title of the article was directed
24 Pantheism. And they believe that the evidence for
25 pantheism, for intelligent origin of life is so great

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1 that they recognize a scenario where some intelligent
2 civilization in deep space sent astronomical messages to
3 the earth loaded with life signals, loaded the earth, and now
4 their searching like a laboratory experiment.

5 It -- and then Dr. Houder, who is one of the
6 authors of one of the three paper theories of the origin
7 of the universe in the last century. It's still been
8 eliminated from the reading. But it -- and he is a Nobel
9 prize winner, wrote a book entitled The Intelligent
10 Universe. And it does say what we -- what it sounds like.
11 he is showing that we cannot explain the universe apart from
12 intelligence.

13 Q To which is -- in fact, is I should have just one
14 second?

15 Are you aware of the lower School Board policy in
16 this particular case?

17 A I saw it quoted in the complaint. I believe it was
18 the complaint, or the issue document.

19 Q Do you support using the book of Pandas and People
20 to advance a religious agenda?

21 A Oh no. We've opposed that throughout the sale of
22 throughout the -- both editions of Pandas.

23 Q Were you ever contacted by anybody like the lower
24 School Board before the constitution of the policy?

25 A No, we were not.

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Q Were you ever contacted by anybody from the Dover School Board since the policy was instituted?

A No.

Q Do you know how they got ahold of your book Panda? and Panda?

A No, don't. We have no idea how they got ahold of the book.

Q Did Thomas More Law Center ever contact you about the policy before it was implemented?

A No, they didn't.

Q Did they ever contact you about the policy after it was implemented?

A No.

Q Did you ever call the Thomas More Law Center?

A Yes, I did. I called Mr. Thompson, and he said Thompson. On April 15th, I was convinced that we had a few things that he may not have, that are not widely circulated among intelligent design enthusiasts and educators, and I wanted to offer them to him if he thought they would be useful.

Q Now, when you called on April 15th, was that because of some recent knowledge you gained of what was going on?

A It was because my own academic editor, Dr. William Dembski, told me that he had been in touch with

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Mr. Thompson. And he felt that it was strange and, frankly, very uncomfortable that we had not had contact with the Dover School Board, we had not had contact with the Thomas More Law Center, and yet we were the publishers of the book. The producers of the book, we knew more about the book than anybody. And so, you know, I did -- I did ask Dr. Dembski for the phone number, and he gave me Mr. Thompson and introduced me, and then I called him.

Q After that, were you ever able to talk to the Thomas More Law Center or anybody there about the liberty of intellectual design?

A No, we never did discuss it.

Q Did you ever discuss what your interest is in this suit right now?

A No, we did not.

Q Did you ever discuss your standing concerning school board policies with respect to the use of your book?

A No.

Q With respect to school board problems and the use of your book, who do you target your book to?

A Well, we have three the beginning, we targeted our book to teachers. That's the one thing that unites a lot of different marketing methodologies. For example, we exhibit the needs of science and education professionals. We place space ads in education journals.

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Now, we're not doing all of these things simultaneously, but over the years we've done that. We've done direct mail to biology teachers. We have been building a network of independent reps who go and they contact directly with individual science teachers.

Q Why do you target it to science teachers instead of school boards?

A Well, we market to science teachers because they're the people that have the expertise -- the training and expertise to evaluate the book. And we don't believe that if the book is handed down from above, from an authority structure like a school board, that there's going to be a positive educational experience, especially if the school board requires that the teacher or teachers use the book. And so we've always succeeded -- when we get a call from a school board member, we've always counsel them to loan the book over to the teachers, just hand it directly, don't say, you know, I really think that is a great book or whatever, just give it to the teachers, the science teachers, and just say, you know, I would like to know what you think of it, and with your background and expertise, I would like, you know, I would like to hear about that.

Q When -- has there ever been a time when you have refused to send a book to a school district because of a school board policy?

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A Yes, there have been two notable instances where the school board was ready, was poised to pass a resolution requiring the use of Panda and People, now in Louisville, Ohio, and one right up the road from us in Plano, Texas. And because in Louisville there was a connection between creation science and intelligent design, and they wanted to get the school board to pass a policy that it would be used, we wrote them a letter and said we will not sell you copies of Panda and People. We did the same thing in the case of a Plano school district.

Q Getting back to your conversations and your contact with Thomas More, after that conversation with Thomas Thompson in April of this year.

A Yes.

Q Did Thomas More ever contact you concerning the documents you had sent them?

A I'm sorry, I'm assuming the --

Q The documents that you had sent them.

A No.

Q Did they ever contact you to find out what your position was on the policy?

A No, I was never asked about my -- my position on the policy.

Q Have you ever asked about your legal interest?

A No.

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THE COURT: I think he said he had no contact, is that correct?

THE WITNESS: Well, I think -- were you asking about afterwards, later?

MR. BOWEN: I believe there was one contact, your honor.

THE COURT: All right.

BY MR. BOWEN:

Q Did you at some point in time receive a message from Mr. Gillen?

A Yes.

Q And when would that have been?

A That was on April 21st, I got three phone calls that day. One was from Bill Denhart, who is Denhart's editor, and he said that you are going to be served a subpoena. And I got a call from Patrick Hamilton, who I know, you know, will you produce a subpoena if it's sent by mail or do you need to be served. And he replied that I still had it either way, but I'll go to prison before I turn over the book over to you -- referring to the Design of Life. And then the third call was from Thomas More, from Patrick Gillen.

Q And was that just an informational call?

A Yeah, letting me know that we could be subpoenaed.

Q Did he refuse to represent your interests at that point in time?

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A No, I don't believe so. I don't remember that he did.

Q Did you have any further conversations with Mr. Gillen after that?

A Yes, there were. There were very, very brief contacts, but not anything of the nature of defending our interests or what was your concern, what was your intention, you know, what is your exposure, looking like that.

Q Okay. After you heard about the subpoena, when was the subpoena served upon you?

A Well, the subpoena -- the mail notified about that because I was told that estimatively the day the phone call was made that's when the clock started ticking on the subpoena. But I didn't -- I was on my way out of town within a few days of the 21st, and I was unable to handle my trip. So I spent the first two or three days of my trip actually trying to locate an attorney. And then this -- and the subpoena was delivered to our office on the 25th of April, and then I saw it when I returned to town another day or two later.

Q Were you able to locate an attorney?

A Yes, I was.

Q And you was that?

A It was Jeff Hawkins of Moore & Shattuck.

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Q And did Mr. Hawkins get a copy of the complaint and the lawsuit for you?

A Yes.

Q And prior to that, that was a question would have been asked May, has you ever seen the complaint before?

A No, I had not seen anything about the lawsuit other than the subpoena.

Q What actions did you take with regard to the subpoena after that? What legal actions did you take?

A Well, following Mr. Moore's advice, we submitted a motion to dismiss and a motion for a protective order.

Q Where were those motions filed at?

A Well, one was filed in this Court, and one was filed in the Southern District of Texas.

Q And a hearing on the motion to quash in this Court was held on May 12th of '05?

A Yes, that's right.

Q And the hearing in the Southern District of Texas was held subsequent to that?

A Yes.

Q Did anybody from the Thomas More Law Center show up for the hearing in Southern Texas?

A No, they didn't, not any written communication.

Q -- No, there was no presence from Thomas More.

Q And I think we've covered it, but through these

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conversations had Thomas More ever sought your interest?

A No, they had not solicited our interest or our resources or our exposure.

Q Okay. And they did not show up to the hearing on Thomas?

A That's right.

Q Do you have any confidence in -- that the Thomas More Law Center is representing your interest at this point in time?

A No, I don't have any confidence in that at all.

Q I think, you know, that we are -- we are certainly the primary stakeholder in this, and we are -- our interests are -- you know, as a company to the lawsuit, our interests are highly at risk, at least. And just the economic part of this, even less the reputation among potential authors in the future, this would cost us a great deal.

Q Do you have any confidence that the Thomas More Law Center is representing your interests in this matter?

A No, no, there's not any confidence that they are.

Q Who is William Denhart? I believe you mentioned his name earlier.

A Yes, Mr. William Denhart is the academic editor, and he's the editor of the book The Design of Life, and one of the new -- the three new co-authors.

Q And how would you describe Dr. Denhart's position in the Intelligent Design movement?

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Q Well, there are many people there could say that he is the premiere intelligent design scientist at this point. Eve would say Michael Behe is, who is someone one of our authors. But Dr. Dembski is precise, he's produced a better edited or annotated, roughly ten books about the intelligent design thing going underway. He debated -- he and Behe debated the Darwinists at the American Museum of Natural History. He published a book with Cambridge University Press. He travels really around the world speaking and debating.

Q And he holds multiple Ph.D.s, is that correct?

A Yes, he's got a Ph.D. in mathematics from the University of Illinois, and a Ph.D. in philosophy from the University of Chicago at Chicago. I mean Illinois at Chicago, pardon me.

Q Does he have a relationship -- did he have a relationship with the Thomas More Law Center?

A He did. He was an expert witness for them at one point.

Q And is he an expert witness at this point in time?

A Yes, he's still he's an expert witness now. He was fired.

Q By whom?

A By Mr. Thompson.

Q And how does that, his lack of involvement in this

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case, within your interest if at all?

A Well, he's the leading authority and expert on the book. And so he would be tremendously experienced in taking the points, answering the allegations, establishing the book, establishing its scientific status and so forth.

Q And you familiar with John A. Campbell?

A Yes, I am.

Q Who is Dr. Campbell?

A Dr. Campbell is a professor at Memphis State, I believe, of the -- his area is the sciences. I believe, the sciences of science. And he's very well conversant with the intelligent design/Darwinist debate.

Q And he had a relationship with the Thomas More Law Center?

A Yes, he did.

Q And you know if that relationship has continued?

A He was hired as an expert witness, and then he was -- he was fired.

Q Do you know by whom?

A I don't know.

Q By the Thomas More Law Center?

A By the Thomas More Law Center, right.

Q Does his discharge affect Kitz's interest in this litigation?

A Well -- he's a leading authority, and yes, yes, I

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mean it puts us in greater jeopardy. We -- we need the assistance that, you know, are willing to be expert witnesses.

You have to understand that there are many scientists who have tremendous credentials who have no stomach for this kind of thing. And we don't have access to everybody that, you know, that has -- that believed in intelligent design or has done great things in science.

So yes, this is an extremely disappointing loss. It's available to us.

Q Now, the plaintiffs in their lawsuit have alleged that their policy of Dembski's had a religious agenda or motive. Do you have a religious agenda or motive for the book Penner and People?

A No, I don't.

Q Is your interest solely educational and scientific?

A My interest is scientific and educational, that's correct.

Q How does that differ from Dembski's interest in this case?

A Well, I think that the manner that I listed above, you know, from the Dembski's side aspect of Dembski's indicated religious purposes to me.

MR. BOTTE: If I could have just one second, Your Honor?

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(Pause.)

MR. BOTTE: Thank you, Your Honor.

THE COURT: Let's go to plaintiff.

(CROSS EXAMINATION)

BY MR. SCHNEIDER:

Q Good afternoon, Mr. Duell.

A Good afternoon.

Q My name is Dean Schneider and I represent the plaintiffs.

You indicated that you were familiar with

Dr. Campbell and Dr. Behe.

A Yes, Dr. Campbell and Dr. Behe.

Q I'm sorry. And was you familiar with Steven Meyer?

A Yes, I am.

Q Do you understand that he was also an expert in this case?

A Yes, I do.

Q And do you understand that he also is no longer an expert in this case?

A Yes, I do.

Q Now, you said Dr. Dembski is affiliated with the Foundation for Thought and Ethics, right?

A That's right.

Q Dr. Campbell is not, correct?

A That's correct.

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Q And Dr. Hays is not correct?

A That's true.

Q Okay. The precipitating event for those three

experts being awarded fees was the fact that they requested private representation at their depositions by counsel for the Foundation, wasn't that right?

A I know that to be true in the case of Bill Parkhill, Dr. Burdick.

Q Is it not true for Dr. Campbell and Dr. Meyer?

A I'm not saying that, I just don't know.

Q Do you understand that in the -- in one of the pleadings that the Foundation submitted in support of its intervention that it represented that certain experts requested private representation by counsel for FIS?

A Yes.

Q And that request -- that request by those experts for representation by counsel for FIS was not attempted by counsel for the Foundation, correct?

A I'm sorry, would you explain that?

Q Yes. The request that those three experts made for representation by counsel for FIS was not agreed with by counsel for the defendant, Thomas More, correct?

A And you saying that those three are named in the document you mentioned?

Q What I'm pointing out is the reply brief that the

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Foundation submitted in support of intervention... it says, "When certain experts requested private representation by counsel for FIS, defendants, parent, strategically filed several expert reports. They insisted on that representation."

Q Do you understand that to be the case?

A I understand that, yes.

Q And ultimately they were not allowed to have that second representation, correct?

A Right.

MR. BOYLE: I'm going to object to the term "second representation."

THE COURT: What are you going to do to traverse as he said it, and then is a bench proceeding?

MR. BOYLE: Well, just to clarify for the record that they requested their own representation.

THE COURT: Well, it's so noted. You say proceed by Mr. Rothschild.

Q Now, you acknowledge that you were not aware of when the Pandus books were purchased for Dover, correct?

A Not at all.

Q Okay. And, in fact, when school districts or other purchasers purchase Pandus, it's not always directly through the Foundation, correct?

A Yeah, I would say it's not always. I mean we have no way of knowing how much -- you know, we have no way of

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knowing about purchases that weren't directly from us.

Q Some are done through or like vendors.

A There are -- you know, there are distributors.

Q Generally, we would expect them to call us, at least the ones negative over the years would call us.

Q In the case of Dover, you weren't aware of how the book was going to be used in that school district or high school, correct?

A We weren't aware that the book was being disseminated.

Q Okay. And so therefore you wouldn't aware of whether it would be, for example, in the curriculum -- in the classroom or in the library?

A We -- when they did this, before the press reports came out reporting what they had done, we were not aware that the book was being disseminated in Dover.

Q And so that sometimes the case for other school districts, that you're not aware that the book is being purchased?

A It has been the case on some occasions, it certainly is the extraordinary. But I'm certain that over the years that's happened.

Q And is it sometimes the case that even when you are aware of who purchased it, you don't know how the book is going to be used in the school district?

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A We try and contact the school district if we know there is an interest or maybe making a purchase or they've made a purchase, to find out, you know, what their intentions are. We know that having talked to an actual teachers and administrators in schools as we have, we might be able to help them.

Q And as I mentioned that, for example, one of the on-line vendors that the book is sold through is a home vendor who provides support to people who are home schooling their children?

A Yes.

Q And so that -- and I think it that some of the purchasers of the Pandus books are people who are home schooling their children?

A Yes, that's right.

Q And I said it it's when the case that private schools or sectarian schools sometimes purchase the books?

A I'm sure they do.

Q Just to make sure I understand your testimony on direct, your estimate of the loss or profits that could come depending on how this Court rules, is based on the amount of inventory that you have of Pandus, the books you have?

A In part, in part on the inventory.

Q And one printing of -- one subsequent printing of

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1 Pandas?

2 A One subsequent printing of Pandas and a first
3 printing of The Design of Life.4 Q Okay. You never have been told by anybody at Duquesne
5 that they're going to ask for their money back if they lose
6 this lawsuit, have you?

7 A No.

8 Q You filed your petition to intervene on May 21st?

9 A That sounds right.

10 Q And you're aware that the complaint in this case
11 was filed on November 14th.

12 A No, I wasn't aware of that.

13 Q Are you aware of that now?

14 A Since you just asked it, yes.

15 Q Okay. Prior to that you were not?

16 A No.

17 Q Okay. You were aware sometime around December of
18 2004 or the beginning of 2005 of the lawsuit, weren't you?19 A I was aware early in the year, early in '04 that
20 there was some more stuff. You know, there was some
21 talk in the media.22 Q And the reason you were aware if you were actually
23 going onto the Internet and looking for articles about this
24 lawsuit, right?

25 A Basically, yes, I wasn't. You know, I read I

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1 certainly had an article or two sent to me.

2 Q You were not following it on the Internet?

3 A No.

4 Q You knew also aware that Pandas was part of the
5 lawsuit?6 A I heard that somewhere in '04, you know, in the
7 spring.8 Q Mr. Buell, you remember having your deposition
9 taken by my colleague, Shrik Kirtley last week?

10 A Yes, I do.

11 Q And I'm going to --

12 MR. ROSENFIELD: If I may approach the witness,
13 Your Honor?

14 THE COURT: You may.

15 MR. ROSENFIELD: Your Honor, would I see a copy?

16 MR. ROSENFIELD: Certainly. Your Honor, would you
17 like a copy?18 THE COURT: Are you going to take him to a brief
19 passage?

20 MR. ROSENFIELD: Yes, I do.

21 THE COURT: I won't think I have a copy. I'll have
22 see me if I do.

23 MR. ROSENFIELD:

24 Q Do you see on page 98 of the deposition, if you
25 could flip through it. These verbatim of the deposition

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1 have been numbered pages on each single page.

2 Q Do you see on page 98 my colleague, Mr. Wilcox,
3 asked when you became generally aware of the lawsuit, it's
4 on line 15 at page 98?

5 A Yes, ah-hah.

6 Q And you answered that around the turn of the year
7 or my guess was that it was in December, correct?

8 A I'm sorry?

9 Q When he asked you when you became generally aware
10 of the lawsuit, you answered, close to the turn of the year,
11 and then you went on to say, my guess is that it was in
12 December.

13 A Okay, I see that.

14 Q That was your testimony, correct?

15 A Right.

16 Q And then he asked you whenever you knew the book
17 involved was Pandas, didn't you -- and this is on page 99,
18 at line 15

19 A Yes, ah-hah.

20 Q And you answered yes. Right on that next?

21 A I think at that point we're talking about line 15.
22 I told, from what I saw in press reports I wasn't aware --
23 It wasn't clear to me that the school board knew the
24 difference between creating misleading and intelligent design.
25 But they knew. But you knew the book involved was Pandas,

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20

1 didn't you.

2 Q So I don't know exactly when I became aware that
3 Pandas was involved. I also don't know to this point. I've
4 heard conflicting information as to whether Pandas is -- has
5 been -- the policy selected Pandas for use in the classroom
6 or put in the library.

7 Q But you knew that Pandas was involved?

8 A Yes, at some point I became aware of that.

9 Q And if you somehow went to page 100, you stated, I
10 read the articles as they, you know, as we pulled them off
11 the Internet, isn't that right?

12 A Yes.

13 Q So you did pull articles off the Internet?

14 A Yeah, but we were not researching, we were not
15 going to Google and searching on it. We didn't Google it.
16 Somebody would say, you know, there's an article on such and
17 such, and so I would go there.18 Q Okay. And during that time that you were becoming
19 aware of the lawsuit through the articles, you didn't try to
20 get a copy of the complaint, correct?

21 A No, I didn't.

22 Q By now you have read the complaint?

23 A Yes, I have.

24 Q And if I understand the lawsuit, you're intervening
25 here is because you think FTE's educational interests are

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threatened by the position that the plaintiffs are urging the court to take, is that right?

A Yes, except where things I think also put -- our interests in terms of publishing and being a participant in the process of education and science are also at risk here.

Q And the reason you think those interests are at risk is because plaintiffs are arguing that intelligent design is a religious concept not a scientific concept?

A Very, that's right, that is -- that is a very large concern to us because that would cause the market for the book to evaporate.

Q And another concern you've expressed that would affect your economic interest and the educational interest is that plaintiffs are arguing intelligent design is a creation of creationism, is that right?

A Yes, that's right.

Q And if I understand your briefs and your testimony today, you weren't aware of that until the Foundation became involved in the litigation through the symposium.

A That's really what made it clear to us that we were in the marketplace.

Q Now, you would agree that if you had read the complaint you would have realized there were the plaintiffs' contentions?

A Yes, I would have if I had read the complaint.

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1 didn't even know that a lawsuit involved a complaint that was written and submitted.

Q But you agree that having not looked through and complained those propositions that you're concerned about that intelligent design is a religious concept not a scientific concept, and that intelligent design is akin to creationism, there was apparent in the marginality, correct?

A I believe so.

MR. ROTHSCHILD: Your Honor, I would like to introduce an exhibit. May I approach the clerk?

THE CLERK: Give a copy to opposing counsel.

MR. ROTHSCHILD: Would you like a copy, Your Honor?

THE COURT: Yes, please.

BY MR. ROTHSCHILD:

Q Mr. Suell, what I've given you is an article in the New York Times dated January 16, 2005, in a story that was printed from the Internet entitled, An Alternative to Evolution splits Pennsylvania Town.

If you would turn to the second page of the document, and look at the second full paragraph.

A All right.

Q To you see there it says, in old December 11 local papers represented by the American Civil Liberties Union and Americans United for Separation of Church and State sued the school board contending that discussing intelligent

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1 design is a way to bring religion on their children do you see that?

A Yes.

Q So that makes clear that the ACLU and the Americans United, they always forget by law firms, was taking the position in the complaint, in the lawsuit that intelligent design is religious?

A Yes.

Q And you recognize this as an exhibit that came out of the Foundation's production of documents?

A Yeah, I think I do.

By the way, if I might add, we did not read everything that came on us in this regard because over the years we have seen certainly thousands of exhibits, and they all follow a very similar pattern, scheme. So I can tell you that I saw this article. I can tell you also that I didn't read it. I probably scanned down the flyer, you know, several paragraphs.

Q Now, you testified today that the Foundation does not have a religious agenda or religious content?

A That's right.

MR. ROTHSCHILD: Your Honor, I would like to ask another exhibit.

BY MR. ROTHSCHILD:

Q Mr. Suell, do you recognize the document I've given

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1 you, which is the second exhibit today, a Form 990, Return of Organization Exempt from Income Tax for 2003 to me a document filed by the Foundation?

A Yes, I do.

Q Okay. And if you would turn to the last page of that exhibit, are you on that page?

A I am.

Q And if you go about 50 percent down the page, there's an entry for statement of organization's primary exempt purpose.

A Oh-huh, um-huh.

Q And the explanation that the Foundation provides to the IRS is that its primary exempt purpose is promoting and publishing textbooks promoting a Christian perspective, is that right?

A That's what it says.

Q Okay. And Pandas is one of those publications, isn't it?

A No, Pandas wasn't for this because this is not an accurate statement.

Q Okay. That --

A This statement was -- we had a new CPA do our 990 and would we not have used before. It wasn't seen from the state of Texas. He was not familiar with us. You know, I didn't see that statement, nobody gave him that

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1 Information, and I didn't -- I certainly didn't approve it.
 2 Q Okay. So, and in this statement that's filed
 3 with the IRS so that the Foundation can be exempt from
 4 paying income tax -- is that what you're saying?
 5 A Well, I'm saying that I didn't see that statement.
 6 Q And just if you could turn to the preceding page of
 7 the document, those are your initials on the page, isn't
 8 that, towards the bottom of the page?
 9 A Yes.
 10 Q Now, your counsel brought up your articles of
 11 incorporation and I'd like to show those to you as well.
 12 These are the articles of incorporation that the
 13 Foundation filed with the state of Texas.
 14 THE COURT: It's not clear that was germane to a
 15 question.
 16 THE WITNESS: Oh, I'm sorry. Yes, I'm sorry.
 17 THE COURT: Let's keep this moving.
 18 MR. ROTHSCHILD: Sorry, Your Honor.
 19 BY MR. ROTHSCHILD:
 20 Q And on the second page of the document, there's a
 21 signature space with your signature on it?
 22 A On the second page of the document? Yes, uh-huh, I
 23 see it.
 24 Q If you go to the third page of the document, it
 25 justifies the purposes for the -- the which the corporation

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1 was formed?
 2 A Right.
 3 Q And what it states is that the primary purpose is
 4 both religious and educational, and then it talks about
 5 teaching about the Christian gospel and understanding of the
 6 Bible?
 7 A Yes.
 8 Q Is it your testimony that that's also an inaccurate
 9 statement?
 10 A It was inaccurate that the attorney that was
 11 helping us prepare established that. I felt that it was
 12 inaccurate. He said we had to be clear in identifying
 13 yourself as having a religious nonprofit purpose, and so the
 14 language that originated with me in the phrase, "but is not
 15 limited to."
 16 Q And something else was the attorney's?
 17 A Yes, most of it. I think really, all of it, possibly
 18 all of it.
 19 Q So the accountant got it wrong and the attorney got
 20 it wrong?
 21 A That's true.
 22 MR. ROTHSCHILD: I would like to take another
 23 exhibit, Your Honor.
 24 BY MR. ROTHSCHILD:
 25 Q Mr. Buell, this document is something that was

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1 pulled off the Internet, but you recognize it as a purpose
 2 statement for the Foundation that used to be distributed?
 3 A Yes, I don't actually -- I don't actually remember
 4 this statement, but it's obviously an IRS statement.
 5 Q And in this statement it says, "The Foundation for
 6 Thought and Ethics has been established to introduce
 7 biblical perspectives into the mainstream of America's
 8 humanitarian society, confronting the secular thought of
 9 modern man with the truth of God's word."
 10 A Yes, that's right.
 11 Q And then it talks about how there would be a
 12 journal -- a textbook published which will present the
 13 scientific evidence for creation side by side with
 14 evolution.
 15 A Yes, and this, by the way, was written before -- I
 16 can just tell from the language, this was very early, before
 17 the National Academy defined the term human evolution. So
 18 the terms of art that are in play today were not in
 19 existence at that time.
 20 Q This was just your use of the word "creation"?
 21 A Yes, right.
 22 Q And into the third paragraph it describes the
 23 Foundation as a Christian think tank, correct?
 24 A Yes. I would say in contrast to that, there's what
 25 we've done for over 25 years, which is not to be a Christian

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18

1 think tank, but in actually, engage in primary works of
 2 science.
 3 Q And that includes Pandas, correct?
 4 A It includes Pandas, yes.
 5 MR. ROTHSCHILD: Real exhibit, Your Honor.
 6 BY MR. ROTHSCHILD:
 7 Q You recognize this as a letter that you wrote to
 8 cause funds for the Foundation?
 9 A Yes, I do.
 10 Q And this was written in 1995, well into the
 11 Foundation's 25 year existence?
 12 A M-hmm, um-hmm.
 13 Q And just, by Buell, in the second it starts it you
 14 can say yes.
 15 A It's really, yes.
 16 Q Not a problem.
 17 And this letter was written after both volumes of
 18 Pandas had been published, correct?
 19 A That is correct.
 20 Q And in that it mentions Pandas, right, the letters?
 21 A Yes, it does.
 22 Q And at the bottom of the first page, what it says
 23 is, "Our commitment is to see the monopoly of materialism
 24 overturned in the schools broken. Presently school
 25 curriculum reflects a deep hostility to traditional

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BUELL - CROSS - ROTHSCHILD

19

1 Christian views and values, and indoctrination students in
2 this subject through similar but persuasive arguments?

3 Q Do you see that?

4 A I see that.

5 Q That's what you wrote, correct?

6 A Yes.

7 Q And your view one of the areas of education that
8 is a primary offender in terms of showing hostility to
9 Christian views and values is the subject of biology, isn't
10 that right?

11 A Yes, that's right. I think that anybody should
12 appear this from an education -- should appear that science
13 as the status of education being impeded, just from an
14 educational standpoint.

15 Q Separate the teaching of biology you consider to
16 show a deep hostility to traditional Christian views and
17 values?

18 A I think that the teaching of biology is done with
19 an artificial tenet of biology from the sciences which are
20 ineffectively maintain intelligent man. I think that is
21 an artificial foundation of science.

22 Q And then it goes on over to the next page, in the
23 first paragraph, you state -- you state the current
24 deplorable condition of our schools resulting in these past
25 in denying the dignity of man created in God's image.

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20

2 correct?

3 A Yes, correct.

4 Q And the very of the paragraph builds on that

5 concept, right?

6 A That's right. Many teachers tell us they have
7 difficulty with -- in the classroom with student behavior
8 because there is -- there's no sense of respect or
9 accountability to the teacher, to the school, or to
10 authority.

11 Q And effectively what you're advocating in this
12 fundraising letter is that the FTE's political team are an
13 obstacle to a partial solution to these problems of
14 hostility to Christian views and the cultural decay in our
15 schools, isn't that right?

16 A I would say that they're not an obstacle to the
17 narrative in Christian views, nor they are an obstacle to
18 the hostility toward positive character education and moral
19 training and a Christian outlook and philosophy.

20 Q And you think Parents would contribute to that
21 cause?

22 A I think Parents would reestablish a level playing
23 field where if science were true to entertain intelligent
24 education wherever we find it.

25 Q And also it would be a remedy or antidote to these
26 issues of character that you're talking about?

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1 A You know, that would be up to individual
2 individuals and their own minds.

3 Q That's what you're advocating here, Mr. Buell?

4 A What I'm saying here is that I think that many
5 would, once they see that it's a plausible option for them,
6 but that would be their choice. That would be how they may
7 respond.

8 Q Mr. Buell, this is not the first time that you have
9 recognized that a court decision could affect the financial
10 fortunes of your company, isn't that right?

11 A That is right.

12 MR. ROTHSCHILD: If you're just going to me now, Mr.
13 Buell, correct?

14 (Pause.)

15 BY MR. ROTHSCHILD:

16 Q Mr. Buell, do you recognize the document we've just
17 introduced as an exhibit?

18 A Yes.

19 Q It's a letter that you wrote to a potential
20 publisher of a book?

21 A Yes.

22 Q And just to read ourselves here, if you turn to the
23 second page, there's mention of a book called Biology and
24 Origins, is that right?

25 A Yes.

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BUELL - CROSS - ROTHSCHILD

22

1 Q And Biology and Origins was the working title for
2 the book that became Pandas, correct?

3 A Well, it was the first best working title that was used
4 prior to the publication of the book.

5 Q There weren't two different books. This is the book
6 that eventually, after their meeting, became Pandas,
7 correct?

8 A Right.

9 Q And turning to the first page, there is some
10 mention here of polls showing that three quarters of the
11 public were creation taught in schools, and this about half
12 way down the page, and another poll about biology teachers.
13 Do you see that?

14 A I see the first -- yes, I see both.

15 Q And are these the polls you were talking about in
16 your direct testimony?

17 A The second one is.

18 Q Okay, and the first one.

19 A No, I wasn't referring to that.

20 Q Now, this first page talks about a decision out of
21 the United States Fifth Circuit Court of Appeals on the
22 American Academy of Pediatrics and that was an appeal to the
23 United States Supreme Court, correct?

24 A Correct.

25 Q And that's a decision known as Edwards versus

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Aquilino?

A Yes, um, yes.

Q It was eventually decided by the Supreme Court?

A Right.

Q This letter was written before that decision?

A I believe that's right.

Q Okay. And what you said was at issue for the United States Supreme Court was whether there could be state-sanctioned teaching of creation, correct?

A I don't know. Would you point to the exact passage?

Q Yeah, I'm sorry. It's on the paragraph that begins "The U.S. finds it difficult." And if you --

A On the "key." All right.

Q That's what you wrote the decision was about, right, whether the United States Supreme Court would allow state-sanctioned teaching of creation or not?

A I don't know that that was what it was about.

Q Yes.

A Yes.

Q And then if you go down to the bottom of the page, you have some projections of how this book, then called Biology and Origins, would do if the Supreme Court reversed the decision and did not allow state-sanctioned teaching of creation, you said perfect expectations, correct?

A Yes.

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Q Some people might expectations were not actually

realistic, correct?

A Right.

Q And when you say that if they uphold it, it leaves little state-sanctioned teaching of creation, you would then get these projections, the balanced picture would be envisioned, correct?

A I said that, but that does not mean that I would favor that.

Q Okay. But what you are saying is, if state-sanctioned teaching of creation is not allowed, we have these modest expectations, and if it is allowed, then the balanced picture this book is expecting, correct?

A Yeah, I think that was just, you know, good relationship and honest analysis.

Q On the envelope the document that I just gave you?

A I recognize that this document was that all right, handwriting on it.

Q And was this -- this document was a part of a drafting of either Biology and Origins or Origins?

A Yes, it played some role in that, that's right.

Q And if you could turn to page eleven, headed Survey Chapter.

A Yes.

Q If you look in the second paragraph, about half way

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down it says, "Evolution is the theory that natural causes are adequate to account for everything in the natural world, including man itself. Creation is the theory that certain phenomena must be explained by supernatural causes. In this book we continuously theme two theories about life's origin."

A Yes.

Q Okay?

A That's right, that would be, pardon me.

Q This was what was written in this draft of Biology and Origins or Origins?

A Yes. At that point the two creationists did not mean what it does now. It referred to creation as general, not to -- today it is a synonym for creation science.

Q Is today creation means creation science and before creation means --

A Unless the National Academy of Sciences gave it the specific definition, which I quoted earlier, and that definition was affirmed by the U.S. Supreme Court, it did not carry that meaning.

Q Creation, in general, was a word used to -- even in scientific literature, for creationists. And then when you say a creationist, prior to those terms of art, the origin of those terms of art, you were just talking about somebody who holds to a general view of creation, not -- this is not a reference to creation scientists or, you know, a specialized

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viewpoint.

Q So this is the term in operation before the court defined it and before the NAS defined it?

A Yes, it is.

Q And at that time -- and just a general usage of the word creation or creationist, right?

A I'm sorry, would you ask me again?

Q At that time what you meant by creation was just how creation was used in the general public, right?

A Yes, it was just a general -- a broad general term, not a reference to creation scientists.

Q Okay. And similarly, the two creationists was just intended as how it was used generally in the public before it was defined by the NAS and the Supreme Court?

A I'm sorry, I thought that's the question we just discussed.

Q I used the word creation, and now I'm on creationists.

A A creationist in that sense would be like an evolutionist. I mean an evolutionist is not a synonym for evolution science. It's one who adheres to evolution in that broad -- you know, in a broad sense, not defined as later it was defined by the National Academy.

Q So, for example, Harry Huxley is just holding himself out as a creationist, right?

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BUTTE, CROSS - REPTICHILLO

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1 A: I'm sorry?

2 Q: Henry Morris built himself out as a creationist?

3 A: It would be not for it was not a representation.

4 It was not a representation to Henry Morris's thought or

5 thought like Henry Morris's.

6 Q: But he described himself as a creationist, right?

7 Is that right?

8 A: Yes. What you're talking about here is a misuse of

9 words when the vocabulary was not as precise as it is now.

10 And I offer an example of how you can count on that, so

11 because before we ever started this book at all, we

12 published a book that had been acknowledged as one of the

13 top books ever published on the origin of life, published by

14 a secular publisher, outside the previously best selling

15 book by McGraw Hill. And you know, so it would be

16 difficult for us to imagine, having achieved something like

17 that that someone acknowledges from the highest levels of

18 science, and then around and back about creationism, and

19 and try and publish a book as a book on, you know, some

20 kind of a subscription publishing creation science.

21 Q: Actually in this version of the book it describes

22 how creationists saw, doesn't it, if you look at pages 12

23 and 25 and 26. It says there's different types of

24 creationist's literature. There are older creationists,

25 younger creationists, agnostic creationists, right?

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BUTTE, CROSS - REPTICHILLO

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1 A: Yes. We were trying to give more articulation to

2 the breadth of what that term means.

3 Q: And then if you could turn back to page 22, you

4 explain that creation is the theory that science terms of

5 life began abruptly, with these distinctive features already

6 present: Fish with fins and scales, birds with feathers and

7 wings, mammals with fur and mammary glands.

8 That's how you defined creation, correct?

9 A: Yes.

10 Q: All right. And I would like to take you to take

11 a look at an example I've found and people. Turn to page

12 24 in the excerpt I gave you.

13 A: All right.

14 Q: Says, "Intelligent design means that various forms

15 of life began abruptly through an intelligent agency, with

16 these distinctive features already intact: fish with fins

17 and scales, birds with feathers, beaks and wings, etc."

18 That's what you said that?

19 A: I saw it.

20 Q: So that's pretty much the exact same sentence

21 substituting creation for intelligent design, isn't that

22 right?

23 A: The reason that you find the similarity to the two

24 passages is because this sentence was in a line when we

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1 were developing the manuscript. We had not chosen the term

2 "intelligent design" at that point. We were trying to

3 this was just a place holder term until we came to grips

4 with which of the previous two or three terms that are in

5 scientific literature it would really do. And that was the

6 last thing we did before the book was revised. I mean we

7 went to the publishers.

8 Q: It was creation, evolution, creation until now was

9 and then it was intelligent design.

10 MR. BUTTE: Your Honor, I'm going to object to this

11 line of questioning based upon relevance.

12 As the Court will recall, we attempted to describe

13 the difference between intelligent design and creation

14 science, and the Court indicated that that really wasn't the

15 issue for today's hearing or at least that was my

16 understanding, and ask that we move along.

17 MR. REPTICHILLO: First of all, I'm finishing up.

18 Your Honor, as you're concerned about that. The first

19 of all, that was still a substantial subject of the direct

20 testimony. And on the issue of discipline and the interest,

21 the foundation has been in here and claiming that they were

22 surprised to find that plaintiffs would characterize

23 intelligent design as being akin to creationism, that they

24 were surprised that we have suggested that it is a religious

25 proposition that being presented for religious reasons. And

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1 the evidence that has been introduced here, particularly

2 relevant given the nature of object, clearly addresses that

3 point.

4 THE COURT: Well, I'll overrule the objection. It's

5 happy to hear that you're making an end. I think you've

6 made your point. I'll allow the answer to the question. But

7 I think you're going to run the risk soon or being in this

8 area too long. And you're also going to run the risk of

9 lapsing over excessively into your own in chief. And I

10 know you don't want to do that, and I don't want you to do

11 that. So let's move through this. And I'll tell you that

12 we can sit today until five o'clock. I was hoping that we

13 wouldn't have to, but we may have to.

14 Do you have another question?

15 MR. BUTTE: I don't have another question. Your

16 Honor, but there are some points I don't like to clarify on

17 indirect.

18 THE COURT: Well, particularly if you and you

19 certainly will have that right, and in the extent that

20 Black's is questioning that hasn't been asked yet, and I can't

21 imagine what that would be, and we're going to give

22 Mr. Utter an opportunity to ask questions as he needs to

23 know as well, so let's wrap it up.

24 We'll overrule the objection. And I'm not sure.

25 Do you consider the question, will

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THE WITNESS: I would love to hear it again.

THE COURT: I would too. So why don't we read that back.

(SPEAKER READS)

THE WITNESS: That is precisely the actual fact of the matter because scientists took on a specialized meaning while the book was being developed.

There was a new position that was being determined through some extensive interaction between scientists and philosophy science. We knew that it was fundamentally different from creation science. And then when the National Academy came out with their definition, we knew that we had to choose a term that would distinguish between the two. And as evidence of what I'm saying I offer you this, that we, on our own side, first to Little Rock, Arkansas, after Mullins went down, and tried to appeal to the Attorney General not to appeal the verdict, because we felt that it was wrong -- wrong science. And the same is true before the same with Edwards v. Aguillard. We flew to Atlanta, we sat with the attorney, the lead attorney. He tried to persuade him to drop creation science. And it is true that among -- in the literature, intelligent design was a term that appeared last year.

There comes up back to a previous reading.

M. J. Arbib, a British cell biologist and cancer

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researcher, have the term creative intelligence. This was one of the things that we thought about. We picked this term.

Mr. Buell will before us here. I don't know, anyone a good voice we were through with the manuscript, editing it, that we would not use the term that had been assigned while we were doing the book with specialized terminology, and now you're coming now and saying that this terminology was applied today to what we had in mind. That just is not the fact.

BY MR. ROTHSCHILD:

Q Mr. Buell, one of the authors you mentioned for Pandas is Dean Kenyon?

A Yes.

Q And you're aware that Dean Kenyon submitted an affidavit in Edwards?

A Yes, I do.

Q And that affidavit was in support of creation science, wasn't it?

A Yes, it was.

Q And he actually said in that affidavit that was the only two explanations for origin of life, evolution and creation science.

A Dr. Kenyon changed his view after he interacted with us. We went to Davis and Kenyon for the book and after

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of science in Davis' case of biology, and in Kenyon's case in the origin of life.

Dr. Maxton, Charles Maxton, who was the academic editor, was the man who had been steeped in the history of science and philosophy of science and was working out the framework that through which these would be laid out. So we did not hire Kenyon for his view on creation science.

Q And Nancy Pearcey, she also contributed to the drafting of Pandas?

A Yes, under Dr. Maxton's direction.

Q And you recognize that she holds herself out as the owner of Creation?

A I didn't know that.

MR. ROTHSCHILD: I have no further questions, Your Honor.

THE COURT: Mr. Gillen.

MR. GILLEN: I have no questions, Your Honor.

THE COURT: Redirect.

MR. BOYLE: Perhaps we will finish by four. Your Honor.

MR. ROTHSCHILD: Your Honor, I would like to have the exhibit into evidence.

THE COURT: Any objection?

MR. BOYLE: No objection.

THE COURT: Any objection, Mr. Gillen?

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MR. STARKS: No objection.

THE COURT: All right, Exhibits 1 through 5, is that correct?

THE DEPUTY CLERK: I think so, yes.

THE COURT: The last one, have it marked 1.

MR. ROTHSCHILD: I gave you a copy of Pandas, that was the last one.

THE COURT: It's 1-6 on mine.

THE DEPUTY CLERK: That's okay.

THE COURT: So 1 through 5 are admitted. 1-1 through 5 are admitted. Admitted.

EXHIBIT EXAMINATION

BY MR. BOYLE:

Q Mr. Buell, when was exhibit 1 produced to the in response to the subpoena?

A Exhibit 1.

Q Yes, that would be the introduction chapter. The exhibit before that.

A When was it produced?

Q Yes, when was it produced in this case?

THE COURT: Are you referring to 1-7 or 1-8?

MR. BOYLE: Sorry, Your Honor.

THE COURT: I can see we have two different tags, and that's what's causing us to try tag for today's reading, apparently it was a deposition exhibit 1, I think.

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1 MR. ROSENTHAL: That's right.

2 MR. BUELL: That's correct, Your Honor.

3 THE COURT: It looks like to me, out for our

4 purposes today you are returning to B-7 for this hearing?

5 MR. BUELL: And that's correct, Your Honor, I'm

6 sorry.

7 THE COURT: All right, go ahead.

8 MR. BUELL: I looked at the wrong number. This

9 document.

10 THE WITNESS: All right. I have that -- all right,

11 I have that as B, but that's, that's fine.

12 THE COURT: Well, it's B-7 for today. Just assume

13 that. We will have the right document. Go ahead.

14 THE WITNESS: In May.

15 BY MR. BUELL:

16 Q In May of this year?

17 A Yes.

18 Q Prior to this had this document been circulated

19 outside of your office, to your knowledge?

20 A No, it had not.

21 Q Now, you indicated on your initial examination that

22 there were non-Christians that held to the theory of

23 intelligent design.

24 A Right.

25 Q And these Christians scientists that came up with

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1 other scientific theories in the modern day Christian

2 scientists at what?

3 A Yes.

4 Q Could you give us some examples?

5 A Yes, some theories of intelligent?

6 Q Or other scientific theories, outside the theory of

7 origins.

8 A Sure, on your, deny.

9 Q Could you give me a couple examples?

10 A Well, yeah, I think two actual examples that are I

11 think outstanding, one is Dr. Thomas, who is the

12 co-discoverer of the Hubble telescope, however you want to word

13 it, at the time he received a Nobel prize for it.

14 Dr. Francis Collins, the head of the human genome project is

15 a Christian. That would be a couple of good examples.

16 Q And were these views prominent because they were

17 Christian?

18 A No. You know, I will say that they probably were

19 motivated to do good science because they were -- because

20 they were Christians, but like I've heard a Jewish talk

21 about how talk about being motivated by his faith to do well

22 in his field.

23 Q Now, in Exhibit B, it's going to read the tag

24 exhibit B that the proposition, that's in front of you.

25 A Got it.

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1 Q Okay, and the first sentence says, "We are a

2 non-profit organization working in the field of education."

3 A Yes.

4 Q Is that true?

5 A Yes.

6 Q Has it been at the time this was written?

7 A Yes, at that.

8 Q Your goal is to provide supplemental materials to

9 teachers in the public schools, giving them well documented

10 information so they can teach the truth in the classroom?

11 Is that true?

12 A Yes.

13 Q Is the truth always synonymous with Christianity?

14 A It's tricky?

15 Q Is the term "truth" that you use synonymous with

16 Christianity?

17 A Oh, yes.

18 Q What do you mean by "truth"?

19 A Well, I meant that as -- I'm going back to the

20 official record of biology among those sciences where we

21 are permitted to consider intelligent causes.

22 Q Okay. And did you ever -- was there ever a

23 discussion of producing books and people as a religious

24 book?

25 A Never was, there never was.

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1 Q With any religious topics at all?

2 A No.

3 MR. BUELL: I have nothing further, Your Honor.

4 MR. ROSENTHAL: Nothing further, Your Honor.

5 MR. CULLEN: Nothing.

6 THE COURT: I have some questions.

7 REEXAMINATION

8 BY THE COURT:

9 Q I am a little unclear. This lawsuit was filed in

10 December, specifically December 14th of 2004. Tell me

11 when you first became aware of the existence of this

12 lawsuit?

13 A I know that it was filed to the end of the year.

14 Q So is it a fair statement to say in January of

15 2005?

16 A That would be true, yes.

17 Q Well, I don't want to put words in your mouth. I

18 want you to tell me when you found out.

19 A Well, I don't really remember exactly. The end of

20 the year is a very very intense time, and there was just a

21 lot of news and a short period.

22 Q And how did you find out about the lawsuit?

23 A First in news reports, and only then with later in

24 April did I get any more specific information.

25 Q Did you understand in January of this year what the

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Q Is it your belief that that they were moving at the time?

A Well, that's not my question. Did you understand that a group of parents had brought suit against a school?

Q Based in this case alleging that a particular policy by the school board that featured the mention of intelligent

design, that that was -- that those parents allege that that was an infringement of an unconstitutional infringement under the First Amendment?

A I don't think that I recognized it as specifically as you express it. I recognized --

Q What did you know? What did you know?

A I knew that the books were put in a library and that students were told that they could go check the books out.

Q Well, that was my next question. So is it fair that as early as January you knew that Dr. Pennock and Dr. Buehl were signed in the minutes?

A Yes, that's true.

Q All right. Now, it's your contention, if I understand it correctly, that your company or your not for profit interest are not adequately protected by the defendants in this case, is that correct?

A That's true. Correct.

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Q Tell me why.

A Well, because we found out late in the case that the intention was to take intelligent design back to the Supreme Court and have it declared to be creation science, and therefore included in the -- as a religion in the constitutional prohibition against creation science. And we didn't know until well on, until April that we were going to be required to turn over a work in progress.

Q Well, you believe that the thrust of the defense in this case is that? Is that how you're saying?

A It's messy.

Q You said that you found out that creation science is going to be part of a defense. Elucidate on that for me.

A Well, I found out that the intent of the plaintiff --

Q I see, the intent of the plaintiff.

A -- was to take intelligent design back to the Supreme Court and have it included in the creation science.

Q Well, I'm not asking you what the plaintiff's intent is --

A It's messy.

Q -- or their intentions now, I'm asking you about the defendant in this case.

A You are saying, by your version, that you don't think your interests are adequately represented. Now, would

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you agree that your goal would be the same as the defendant's goal, that is, to have the policy of the Dover School Board nullified in place as it's presently worded?

A No, I don't think the Dover School Board policy is -- I think that is the very thing that we have opposed on the part of school boards in the past.

Q All right. But that's what's at issue in this case, is it not?

A Well, my understanding is that we've been led to believe in the documents -- and I'm sorry, Your Honor, I couldn't pinpoint which way, but in the legal documents, that it's the intention of the amici to take intelligent design back to the Supreme Court and have them declare it to be religion or creation science or both.

Q So your belief as to what you claim to be an unconstitutional interest is based largely upon what you -- what you think the thrust of the plaintiff's arguments are?

A Yes, but not exclusively, because \$225,000 is more than any of our annual budgets have ever been.

Q I understand that. And I'm not sure that you understand my question.

A I'm sorry.

Q Perhaps it wasn't clear.

Q If the Dover School Board pays in this litigation in the sense that the policy remains in place,

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that puts you where you need to be, doesn't it?

A If -- if it proceeds, I can't imagine that the ACLU's other goal would be accomplished, so yes, I mean on appeal it might change, but yes.

Q What do you know of the Thomas More Law Center?

A I don't know a lot. I know that he removed their rollings for some period of time, and that I generally feel collegial feelings for them.

Q Do you know how many attorneys have entered their appearance on behalf of the Thomas More Center representing the defendants in this case -- as the defendant in this case?

A I don't know. The only thing that I know was that I believe at one time in this Court there was one, it was Mr. Allen.

Q And it is surprising you if I told you that there might be four attorneys?

A From Thomas More at this hearing?

Q And local counsel?

A Yes, I didn't know that.

Q I guess then I'm interested in understanding why you don't think your interest can be protected when you're not out there very much. Are involved, and because you can't tell me anything about counsel who are representing the defendants.

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1 A I think, you know, part of the reason we brought
2 up -- we gave rise to this viewpoint. We've spoken on it
3 for more than a quarter of a century. We are intimately
4 concerned with and have worked with the two leading
5 scientists who have provided the foundational underpinnings
6 for intelligent design as a science.

7 Q If you were allowed to intervene, would Mr. Dembski
8 be allowed back into this litigation through that
9 intervention?

10 A I hope not. We haven't talked about it.

11 Q Do you understand that if Mr. Dembski would be
12 brought back into this process, that that might lead to that
13 where you sought to proceed before, which is the
14 introduction of the manuscript, of the volume three of which
15 is now, as I understand it, Design of Life? Do you
16 understand that?

17 A In the court proceedings?

18 Q Yes.

19 A Yes.

20 Q And you said earlier that you were going to file
21 before you'd release that, is that correct?

22 A Yes.

23 Q And so I understand correctly that -- it appears to
24 be from what I've seen, that it was Mr. Dembski's removal
25 from this litigation as an expert witness that appeared to

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1 Likewise your desire to intervene, is that correct?

2 A Yes, yes, it is.

3 Q Well, what called you, having known about the
4 lawsuit since January of '03 and then having known where
5 certainly Mr. Dembski's involvement ran from some point to
6 your motion for intervention, what triggered in May of this year
7 your filing of a motion to intervene?

8 A Your Honor, I can't be precisely specific, but I
9 know that it was a combination of what we read after we read
10 the legal documents. It took us a while to read those
11 documents because at the same time we were required by the
12 Northern District of Florida to produce over 27 years of
13 documents, which our office is less than a thousand square
14 feet. They were in boxes unmarked, and so we had to bring
15 in workers and supervise that and be precise about that.

16 So it was when I could read those -- all of those
17 legal documents, I saw that we were really in the
18 crosshairs, and that's why. And we were trying to do
19 something that was expected of us.

20 THE COURT: Thank you. All right. You may step
21 down, sir. That will continue the examination.

22 Now, you say you do not have another witness?

23 MR. BOYLE: I have no further questions, no, yes.

24 THE COURT: All right. I'll allow you to make some
25 closing remarks, if you'd like.

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1 MR. BOYLE: Your Honor, I want to focus upon the
2 facts at this point in time, and that is the adequacy of the
3 representation in this particular case, and the ramification
4 of the intervention. Let me deal with the timeliness first.
5 This case was filed late last year. At that point
6 in time it involved a small school district in central
7 Pennsylvania.

8 THE COURT: I know all of that.

9 MR. BOYLE: Okay.

10 THE COURT: I'm not sure that that helps me. What
11 I am interested in is, the suit was filed on December 12th.
12 It's quite clear now that your client understood that the
13 suit was filed as early as January of '04. Obviously an
14 e-mail to the court. We're moving inevitably towards a
15 trial at some point in the late summer/fall -- actually the
16 fall as previously set by the Court.

17 I am trying to understand why there was no motion
18 to intervene prior to the filing of this motion to
19 intervene.

20 MR. BOYLE: I think there was no movement to
21 intervene because the press reports did not give the true
22 nature of the suit or the nature of Mr. Dembski's involvement in the
23 suit. And that this was not a matter that attracted the eye
24 at all until they received a subpoena from this court.

25 THE COURT: But wasn't Mr. Dembski involved from a

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1 point in time, it seems to me -- and I don't know the exact
2 point in time -- but at some point after January of '03
3 Mr. Dembski was obviously involved at, at least at that time,
4 the defendant's expert. Mr. Dembski was in close,
5 obviously, with Mr. Buell and with his not-for-profit.

6 Are you telling the court that the only source of
7 information that your client had was through press accounts?

8 MR. BOYLE: That's what the testimony I believe
9 indicates, Your Honor, that.

10 THE COURT: That strikes credibility. I don't
11 believe that. In a matter that is -- that is this important
12 to your client, and certainly had some notoriety that
13 transcended simply the community of Dover, and even
14 Pennsylvania, and it was -- and Mr. Buell just said he that
15 he understood -- if I understand his answer correctly, and I
16 think I did -- as early as January he understood that of
17 Pandas and People was something that was the subject, or a
18 subject of the lawsuit.

19 Now, I am having difficulty understanding what the
20 trigger point was for the motion to intervene. It looks to
21 me from the sequence of events that after Mr. Dembski was dropped
22 as an expert. And to me it looks like Mr. Dembski was
23 dropped as an expert because he didn't want to produce, or
24 because his employer didn't want to produce the manuscript
25 of The Design of Life. And it was only after that that I

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1 say the action to intervene.

2 MR. BOYLE: Well, I think that we have to reason to
3 know as to reason to know why Thomas Hake dropped

4 Mr. Demski as an expert.

5 THE COURT: Well, we can -- we can correct the
6 text. Go ahead.

7 MR. BOYLE: Perhaps I conveyed the words differently,
8 Your Honor.

9 THE COURT: Well, tell me how you correct the text.

10 MR. BOYLE: I think what happened in this case is
11 there was a policy in Pennsylvania, and I think that that
12 policy resulted in a variety of news coverage that may or may
13 not have been accurate around the country. I believe that
14 Mr. Demski saw some of that news coverage, did not condemn
15 the fact that that explained FCB's interest that much. And
16 Mr. Speer testified that the school division policy is not
17 the way they select the book. They have no interest in a
18 policy that renders the use of the book.

19 THE COURT: But that's the very subject of this
20 lawsuit.

21 MR. BOYLE: Well, that's one of the subjects of the
22 lawsuit. I think the other subject is whether or not
23 intelligent design is a scientific theory.

24 I think that the position the plaintiffs take in
25 this case is there was a mandatory policy under the Loren

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1 test with a religious purpose. But I think they also in
2 their comments already equated intelligent design with
3 creation science under *Kennedy v. Aquilino*, and for that
4 reason alone out of 30 a separate basis the action should
5 be unconstitutional.

6 THE COURT: Defendants say it's not.

7 MR. BOYLE: Excuse?

8 THE COURT: The defendants say it's not.

9 MR. BOYLE: Well, the defendants, though, your
10 Honor, like to defend the national policy of the Dover
11 school board. That's where the defendant's case really is
12 built. It's on that political determination by the Dover
13 school board.

14 THE COURT: Well, you may say it's a political
15 policy. Is an explicit policy that calls for something
16 to be said as the Court understands it, as a precursor to
17 the Biology curriculum. Now, you call it a political
18 policy. It's a policy. It's a statement. It's being
19 vigorously defended by the school district. My, I might say,
20 experienced and accomplished counsel who have at every turn
21 litigated this case zealously.

22 Now, tell me what you would do, best before today
23 and before today that they haven't done?

24 MR. BOYLE: Well, we would do, your Honor, is we
25 would retain William Dembski and Dr. George J. Annas to

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1 this case.

2 THE COURT: Well, and Mr. Dembski would then
3 reappear in the litigation. And Mr. Speer just said that if
4 Mr. Dembski's manuscript -- if that manuscript is dropped
5 back into the mix, that he would rather go to jail than
6 reveal that. So where does that get us if Mr. Dembski comes
7 back and?

8 MR. BOYLE: Well, in terms of the production of the
9 documents, I don't know that there's been a ruling on that as
10 the relevance of that has been determined.

11 THE COURT: Well, when you put it in an expert
12 report and you name that as the basis for your expert
13 report, then you have a problem if you don't want to disclose
14 it.

15 MR. BOYLE: Well, it's a handicap, Your Honor, to
16 try to litigate the case, a case of intelligent design
17 without using the foremost experts in the field.

18 THE COURT: Well, you want to unring a bell, and
19 I'm not sure that that can be done in the case of
20 Mr. Dembski, and I think you get into a, be careful what you
21 wish for, it may come true, if an actual intervention is
22 granted in this case.

23 MR. BOYLE: If intervention were granted, Your
24 Honor, we would -- we would take a different tact with
25 respect to the policy, the Dover policy. Our approach is --

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1 THE COURT: What?

2 MR. BOYLE: To litigate intelligent design.

3 THE COURT: What would you do?

4 MR. BOYLE: Excuse?

5 THE COURT: What would you do? I still haven't
6 heard it. You say you would take a national test. I don't
7 understand what it is.

8 MR. BOYLE: Well, we would attempt -- we would
9 establish to separate the differences between intelligent
10 design and creation science.

11 THE COURT: And you don't think that the defendants
12 are doing that?

13 MR. BOYLE: I think the defendants are, by the
14 statements made by their clients, are limited to -- I think
15 they have to defend a policy. I think they have to decide
16 to defend a political --

17 THE COURT: And that's the very subject of this
18 litigation. And it seems to me by your statements that you
19 want to raise this a broader litigation by the intervention,
20 and I'm not sure.

21 MR. BOYLE: I think.

22 THE COURT: -- that that needs answer.

23 MR. BOYLE: If the case only involved the Dover
24 policy and not the theory of intelligent design, it would be
25 a narrow case, but the plaintiffs have taken the view, as I

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understand it, that intelligent design, is creation science, a perspective of the policy. And that is where the interest is.

THE COURT: And how are you going to rule differently or not to you're in or if you're not in?

MR. BOYLE: Well, because our interest is in preventing the scientific evidence and the legal arguments in that case.

THE COURT: And you don't think the defendants are going to do that?

MR. BOYLE: I think the defendants are limited to what I think they're limited to the depth of the policy. The amendment has dictated and what that policy is. I don't think the Dover policy and intelligent design are synonymous.

THE COURT: Your client just told me he didn't know the many attorneys were in from him from the Thomas More Law Center, he knew very little about the attorneys who were in, quite obviously. He had a tenuous relationship with Thomas More, but didn't know that much about them. How can you now before this court and indicate to me that the impropriety wasn't adequately protected when you can't even tell us about course. Not you, but your client?

MR. BOYLE: Well, I think on the flip side of that, Your Honor, the reason why he didn't is because he's never

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had any calls from Thomas More. Thomas More and Joyce would not want his interest in.

THE COURT: Well, think about what that argument implies. That is that there is an obligation on the Thomas More Law Center to, in the name of their representation of the Dover School Board, make contact with every potentially -- take a class action suit, every potentially attempted suit or passage. They don't have that burden, do they?

MR. BOYLE: I don't think they have that burden to contact everybody in the universe, but certainly, Your Honor, the publisher of the book that's at issue would seem to be a primary reason they would contact.

THE COURT: Well, they have Mr. Campbell as their expert. And it was only when an objection was raised to the revelation of the transcripts, it seems to me, that the chain separated here.

MR. BOYLE: I think that the chain separated when Mr. Buell reviewed the subpoena, when he had no notice or no explanation from Thomas More as to how to respond to that subpoena. When he hired separate counsel at that point in time to protect his interests, when motions were filed and when the Thomas More Law Center did not know to an extent to present --

THE COURT: And I might agree that his interests

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discharge as it relates to the disclosure of the manuscript and the need to keep that confidential and I completely understand that, and we were very mindful about that in the prior proceedings. And there's no question that that's the case. But it's not as much that the interests diverge as it gets to the results of the lawsuit. All right.

MR. BOYLE: Thank you. Thank you, Your Honor.

THE COURT: Any closing comments?

MR. BOYLE: Yes, and I will be brief, Your Honor.

On the issue of timing, even if Mr. Buell and the Foundation had not met on their rights in this case, which I feel very strongly they did, it's far less in this case to bring them in. We are at the cusp of discovery, and now what they are talking about is not simply just participating in trial, but that means those depositions are scheduled and prepared for, would be brought into the case.

And what is particularly extraordinary about this is that -- and I don't need to thank Mr. Cullen or his firm, but they're complaining about adequacy of representation because those experts were removed from the case. But if you look at their representation in their brief it was because FTK removal was going to represent them.

MR. BOYLE: Yes, Your Honor, has no affiliation with FTK.

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Mr. Dr. Campbell has no affiliation with FTK. And here is the counsel insisting on representing them in this litigation. They should not be rewarded by sending this manuscript case by being a friend to someone and then bringing those same experts back in whose connections would have to be taken and the presentation removed. That's all I have.

THE COURT: I understand.

MR. CULLEN:

MR. CULLEN: Your Honor, if I may, a few comments.

I'm struggling with my personal price because to some extent I feel like the efforts we made on behalf of the defendants have been rewarded here. But I want to --

THE COURT: Well, to the extent that they have, and I didn't necessarily see that, that may be an overly generous reaction to it. But I will understand, and my comments should imply that I understand the reasons representation that you've provided. And certainly as to the final written, at least on this stage, that is well established. But go ahead.

MR. CULLEN: Thank you, Your Honor. I appreciate that very much.

I want to also be clear and make it clear that I have made it abundantly clear to Mr. Buell that I do not represent FTK. They are counsel to my defendant. We are

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1 not contact them when we purchased the cars because we
2 believed they were believe we purchased a car from
3 someone. I don't know why we would have to contact them
4 and that's why we didn't.

5 It's also true that we did in fact have some
6 feeling of insecurity when the motion of separate counsel
7 was introduced on behalf of some of the experts named in
8 affidavits we did not know about, and we did not want to
9 further by reason of those. There was some sense of, we
10 hired experts to handle the interests of our clients.

11 This was before, immediately into the litigation,
12 gave us reasonable grounds for insecurity concerning the
13 willingness with which we could expect that representation
14 I just want to have it clear for the record that's why we
15 needed not to retain those --

16 THE COURT: Understood.

17 MR. GILLES: Finally, as your comments indicate,
18 Judge, it is the position of the Dover Area School District
19 the defendants in this case, that intelligent design is a
20 scientific theory. To the extent that that is an issue in
21 this case, we will fully and fairly and vigorously defend
22 that interest.

23 YES COURT: All right, thank you.

24 All right, that will conclude part two, and the
25 final part of our hearing this afternoon.

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1 Now, I understand from Mr. Counsel, that you had
2 some concerns about scheduling, and that you might want to
3 reorganize things.

4 I think what we want to do, as the hour grows
5 somewhat late, and it's a legitimate business to probably
6 set up at some appropriate time a scheduling conference
7 call, and then we can all be ready on scheduling.

8 I will tell you that -- well, let me ask you first
9 of all, the nature of the inquiry, as I understood it, was
10 not that you wanted to delay, it was simply that you wanted
11 to have some idea of where we go after the start date of the
12 trial, and that's certainly fair.

13 It would not be my intention, because I simply
14 can't, given your recent estimate of the duration of the
15 trial. I can't go from start to finish in straight days.
16 That wouldn't work for any of us, I suspect. Everyone is
17 busy and I have other matters that I have to attend to. So
18 what we'll look at, when we have a scheduling conference, is
19 to designate certain days.

20 I am going to do my best to be in Harrisburg for as
21 many days as I can. However, as the day has advanced you,
22 it appears to me that given the expected duration, we simply
23 are not going to be able to avoid having some trial days in
24 Williamsport. I'll try to schedule those back to back, and
25 I wouldn't ask you around unnecessarily that our place is

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1 the other, and for me I want to do that, but we'll work
2 through that.

3 So I'll, by separate order, schedule a scheduling
4 conference. And I'll ask you to put your schedules out for
5 that, and let's try to work through that.

6 I can't promise that it will be in the next week or
7 so, but we'll do it as due time and we'll try to set a
8 schedule so that everyone has a little predictability
9 in a policy that I -- I think that courtesy relates to
10 counsel, although this courtesy was not always afforded to
11 me when I was practicing, but courtesy dictates in counsel
12 that we have some sense of where we're going to that,
13 particularly for those who are travelling in, they can see
14 what they need to do.

15 MR. BENTON: Thank you.

16 THE COURT: Anything else before we close the
17 report?

18 MR. BENTON: No.

19 MR. GILLES: Yes, Your Honor.

20 THE COURT: We'll close the record. We will render
21 a decision with respect to the intervenor status promptly.
22 I will render a decision with respect to the motion to quash
23 after I've had an opportunity to view in camera the
24 documents which will be submitted, as I indicated it, no
25 later than the close of business next Tuesday.

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1 With that, the record is closed and we're
2 adjourned.

3 THE DEPUTY CLERK: All clear.

4 11:24 p.m., court adjourned.

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EXHIBIT'S CERTIFICATE

I, JOHN D. SPENCER, Official Court Reporter for
 the United States District Court for the Middle District of
 Pennsylvania, appearing pursuant to the provisions of Title
 28, United States Code, Section 155, do hereby certify that
 the foregoing is a true and correct transcript of the
 within-captioned proceedings had in the above-captioned and
 numbered cause on the date or dates hereinafter set forth;
 and I do further certify that the foregoing transcript has
 been prepared by me or under my supervision.

JOHN D. SPENCER, SR.
 Official Court Reporter

REPORTED BY:

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